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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 589

A. MAGNANO COMPANY, APPELLANT,

vs.

G. W. HAMILTON, AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED NOVEMBER 15, 1933

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 23, 1934.

been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product sui generis.

IX

That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, Gothic letters of not less than twenty-point type, which [fol. 6] letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the State of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

X

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product sui generis; and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargine only as a wholly original and independent product sui generis.

XI

That for many years last past and continuously up to effective date of said act the average annual sales of oleomargaring in the State of Washington have exceeded

5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the State of Washington, and approximately 3,700,000 pounds were shipped into the State of Washington from other states in the United States of America. That all oleo- [fol. 7] margarine that has been sold by any persons, firms and corporations whomsoever in the State of Washington for many years last past and up to March 9th, 1931, has had the characteristics and been sold under the conditions described in paragraph VIII, IX and X of this complaint. That said oleomargarine of complainant and all other oleomargine sold in the State of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the State of Washington; that thousands of persons of moderate means in the State of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargine; that the total production of dairy butter in the State of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to the present time the production of butter in the State of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the State of Washington was twenty cents a pound and the wholesale price of dairy butter in the State of Washington was twenty-nine cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the State of Washington was twenty-five cents a pound, and the retail price of butter in the State of Washington was from thirty-two to thirty-four cents a pound; that at the time of the filing of this amended bill the wholesale and retail prices of oleomargarine and butter in the State of Washington are approximately the same as they were at the time of the passage of said act, and have been approximately the same throughout the entire period since the passage of the act and up to the present time.

[fol. 8] XII

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the State of Washington of said product; and had and still has,

within the said state, a large amount of property devoted to said business; that the business of the complainant in the State of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9th, 1931, had a regularly established business in which it imported from the State of California and sold in the State of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and that the annual net profits of said business in the said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9th, 1931, said importation and sales of oleomargarine by the complainant in the State of Washington were as follows:

Year	Pounds Sold
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9th, 1931, complainant, by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same, as hereinafter alleged, has not imported from the State of California and sold, and has [fol. 9] not been able to sell, any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufacturted or compounded and thereafter sold such oleomargarine in the State of Washington for use and sale in the State of Washington, or imported into or sold in the State of Washington any such oleomargarine.

XIII

That upon the effective date of said act, viz., March 9th, 1931, and at all times since, the business of manufacturing and selling oleomargarine within the State of Washington, and the business of importing into and selling olemargarine within the State of Washington, has been wholly and completely destroyed; and at all times since the effective date

of said act no revenue whatsoever has been collected by the State of Washington under the provisions of said act, and that since said date no sales subject to tax under said act have been or could be made. That since the effective date of said act no applications have been made to the Collector of Internal Revenue of the United States in the State of Washington for wholesale or retail licenses under the federal statutes to sell oleomargarine in the State of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the State of Washington under said federal statutes since said date; nor has the Government of the United States of America derived any revenue from the sale of oleomargarine within the State of Washington since said date.

XIV

That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective, [fol. 10] your complainant imported into the State of Washington said Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the State of Washington at twenty cents per pound, who, in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act the price per pound at which your complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, and the price per pound at which retail dealers in the State of Washington could resell to the general public, has remained the same, and at certain times during said period would have been two cents per pound less to each your complainant, the retail dealers and the consuming general public. That the allegations of fact contained in this paragraph with reference to complainant's business apply without substantial variations to all other persons, firms, and corporations engaged in manufacturing, importing and/or selling oleomargarine within the State of Washington.

XV

That the defendants have at all times since the effective date of said act threatened and still threaten to enforce against your complaint and/or others similarly situated a tax of fifteen cents per pound on all said oleomargarine

sold by the complainant and/or others similarly situated in the State of Washington. That if a tax of fifteen cents per pound is imposed upon said oleomargarine, all trade and commerce therein in the State of Washington of complainant and/or all others similarly situated are and will continue to be prohibited and completely destroyed, inasmuch as the addition of said tax to the market price of said commodity will make it necessary, if complainant is to make [fol. 11] any profit on said sales, to sell said oleomargarine at a price substantially in excess of the price of said dairy butter which may be purchased by the consumer to satisfy the needs otherwise satisfied and fulfilled by said oleomargarine.

XVI

That the threatened enforcement of said act against your complainant has completely destroyed and continues the complete destruction of all business of complainant in the State of Washington in the sale of said oleomargarine, and the business of all others falling within the scope of said act; that, in addition thereto, said threatened enforcement deprives hundreds of regular and prospective customers of the complainant of their liberty to purchase said product in the State of Washington.

XVII

Complainant alleges that the sales of said Nucoa by complainant in the State of Washington are not taxable under said Chapter 23 of the Laws of 1931, because said act is unconstitutional and void, but that the defendants state that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XVIII

That said act of the State of Washington is unconstitutional and void:

(a) For the reason that the said act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process

[fol. 12] of law, and does and will deny to it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States;

(b) For the further reason that, in violation of the above mentioned Article XIV of the Amendments to the Constitution of the United States, said act deprives hundreds of prospective customers of complainant of their liberty in freely purchasing or entering into contracts to purchase said food product for their own consumption;

(c) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of olemargarine in aid of the dairy industry, a private business;

(d) For the further reason that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of Paragraph 3 of Section 8 of Article I of the Constitution of the United States;

(e) For the further reason that said act violates Article I, Section 8 of the Constitution of the United States in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts, and excises.

XIX

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding.

[fol. 13]

XX

That the complainant has no adequate remedy at law. That unless equitable relief by injunction, interlocutory and permanent, is granted by this court, complainant will be deprived of its constitutional rights as hereinbefore alleged; that the loss of business and property resulting from said enforcement of said enactment is so great and

irreparable and the penalties provided by said statute are so severe and would lead to such a multiplicity of suits and prosecutions that complainant has no adequate remedy except in a court of equity.

Wherefore, complainant prays the order and decree of this court as follows:

1. That an injunction, interlocutory and permanent, issue out of this court restraining the defendants, and each of them, and their employes, agents and representatives, from enforcing said act against your complainant, and that said act be held to have been misconstrued as applied to your complainant, and, if properly so construed, to be unconstitutional and void.

2. That complainant recover its costs and disbursements from the defendants, and have such other and further relief as to the court may seem meet and equitable.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant, Office and Post Office Address: 650 Colman Building, Seattle, King County, Washington.

Receipt of copy hereof duly acknowledged and consent to the filing of this amended bill of complaint hereby given this 18 day of Sept., 1931.

John H. Dunbar, Asst. Atty. Gen., Attorneys for Defendant.

[fol. 14] *Duly sworn to by John A. McGregor. Jurat omitted in printing.*

[fol. 15] EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

CHAPTER 23. EXCISE TAX ON SALE OF BUTTER SUBSTITUTES

An Act relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately.

Be it enacted by the Legislature of the State of Washington:

Section 1. (a) The term "butter substitute" whenever used in this act shall be held and construed to mean and include any compound or compounds of animal or vegetable fats, such as tallow, beef fat, suet, lard, lard oil, suine, lardine, intestinal fat, offal fat, cocoanut oil, olive oil, cottonseed oil, peanut oil, in combination with milk, butter or any product of milk or butter, either colored or uncolored, that does not contain eighty per cent (80%) of milk or butter fat, and is sold or used as a substitute for butter.

(b) The term "distributor" whenever used in this act shall be held and construed to mean and include any person, firm or corporation which produces, refines, manufactures or compounds and thereafter sells such butter substitute in the state of Washington for use and sale in this state, or who imports and sells such butter substitute into this state, except as hereinafter provided.

Sec. 2. That in addition to the taxes now provided for by law each and every distributor, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of representatives or agents in this state, in the sale of butter substitutes as herein defined, shall not later than the fifteenth day of each calendar month render a sworn statement to the director of agriculture of the state of Washington of all such butter subsitute sold by him or them in the state of Washington during the preceding calendar month, and pay an excise tax of fifteen cents per pound on all butter substitutes so sold as shown by such statement in the manner and within the time hereinafter provided.

[fol. 16] Sec. 3. All distributors of such butter substitutes in the state of Washington shall file a duly acknowledged certificate with the director of agriculture on forms prescribed, prepared and furnished by him, which shall contain the name under which such distributor is transacting business within the state of Washington; such certificate shall state the place or places of business and location of distributing stations of the distributor in the state of Washington, the name and address of the manufacturing agent, the names and addresses of the several persons constituting the firm or partnership, and if a corporation the corporate name under which it is authorized to transact

business, and the names and addresses of its principal officers, resident general manager and attorney in fact. If such distributor is an association of persons, firm, partnership or corporation organized under the laws of no other state, territory or nation, if it has not already done so, it must first comply with the laws of the state of Washington relating to the transaction of its appropriate business therein. No distributor, as herein defined, shall, after the law goes into effect, sell any butter substitute until such certificate is furnished, as required by this act.

Sec. 4. Every distributor of such butter substitute shall render to the director of agriculture of the state of Washington, on or before the fifteenth day of each month, on form prescribed, prepared and furnished by said director, a sworn statement of the number of pounds of butter substitute sold by it, him or them during the preceding calendar month, which statement shall be sworn to by one of the principal officers in case of a domestic corporation, or by the resident general manager or attorney in fact in case of a foreign corporation, or by the managing agent or owner in case of a firm or association, and shall contain a statement of the quantities in pounds of butter substitute sold. Bills shall be rendered to dealers in butter substitutes as herein defined. Said bills shall contain a statement printed thereon in a conspicuous place that the distributor of such butter substitute has assumed the liability to the state for the license tax therein imposed and that he, it or they will pay said license tax on or before the fifteenth day of the following month.

Sec. 5. Said excise tax shall be paid on or before the fifteenth day of each month to the director of agriculture of the state of Washington, who shall receipt the distributor therefor and place the same in the state treasury to the credit of the general fund of the state of Washington.

Sec. 6. Every distributor of such butter substitute shall keep a record of such forms as may be prescribed by the director of agriculture of all purchases, receipts, sales and [fol. 17] distributions of such butter substitutes, and such record shall at all times during the business hours of the day be subject to inspection and examination by the director of agriculture, or his deputies, or such other officers as may be provided by law.

SEC. 7. All butter substitutes sold in containers, packages or cases shall bear a stamp or tag showing the date of its issue upon which the same was delivered, the name of the distributor of such butter substitutes, and shall contain in a statement that the liability for the license tax thereon has been assumed by such distributor.

SEC. 8. It shall be unlawful for any person, firm or corporation dealing in butter substitutes to receive or accept any delivery or shipment of butter substitutes from any distributor or to pay for the same, or to sell or offer the same for sale, unless the statement provided for in section seven (7) appears upon the container and upon all invoices for such butter substitutes. If any shipment of butter substitutes is received by any person, firm or corporation from any distributor, or is sold or offered for sale by him or them, upon which the requirements of sections 6 and 7 of this act are not complied with, such person, firm or corporation shall be deemed guilty of a misdemeanor: Provided, That the provisions of this section shall not apply to the receipt or sale of butter substitutes which are exempt from state tax under the constitution and laws of the United States.

SEC. 9. The director of agriculture shall have the power and it shall be his duty from time to time, to adopt, publish and enforce rules and regulations not inconsistent herewith for the purpose of carrying out the provisions of this act.

SEC. 10. Said excise tax shall not be imposed on butter substitutes when sold for exportation from the state of Washington to any other state, territory or nation: Provided, however, The distributor or exporting agent shall make a statement each month to the director of agriculture showing the amount of butter substitute exported.

SEC. 11. If any person shall oppose such butter substitutes in such form and under such circumstances as shall preclude the collection of this tax from the distributor by reason of the provisions of the constitution and laws of the United States, and shall thereafter sell such butter substitute in such manner and under such circumstances as may subject such sale to the taxing power of the state, such person shall be considered a distributor and shall make the

agents and representatives, from enforcing against said complainant Chapter 23 of the Laws of 1931 of the State of Washington, pursuant to the allegations of the verified amended bill of complaint on file in the above entitled cause.

There is served upon each of you herewith a copy of the amended bill of complaint in said cause, the application [fol. 22] for said interlocutory injunction, which application contains a request to the District Court of the United States for the Western District of Washington to convoke a three-judge court for the hearing of said application for an interlocutory injunction, as provided by said Section 266 of the Judicial Code, on a date hereafter to be fixed by said District Court.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant, Office and Post Office Address: 660 Colman Building, Seattle, King County, Washington.

[File endorsement omitted.]

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO AMENDED BILL OF COMPLAINT—Filed Sept. 24, 1931

The joint and several answers of John H. Dunbar, Erle J. Barnes and Roland H. Hartley to the amended bill of complaint:

Come now the defendants and each of them, and say for answer thereto:

I

For answer in lieu of motion to dismiss the amended bill of complaint, the defendants say that said amended bill of complaint does not state facts sufficient to entitle plaintiff to any relief against these defendants and that said amended bill of complaint is wholly wanting in equity.

For a further answer to the amended bill of complaint, the defendants say:

I

Answering paragraphs I, II, III, IV, VI, VII and IX of said amended bill of complaint, defendants admit the allegations therein contained.

[fol. 24] II

Answering paragraphs V and XVI of said amended bill of complaint, defendants deny each and every allegation, matter and thing therein contained.

III

Answering paragraphs VIII and XII of said amended of complaint, defendants are without knowledge sufficient to form a belief concerning the allegations therein contained, and therefore deny the same.

IV

Answering paragraph X of said amended bill of complaint, defendants admit that plaintiff's product was not sold or advertised as or for butter and that it was sold as a wholly original and independent product prior to the passage of chapter 23, Laws of 1931.

As to the remainder of the allegations in said paragraph contained, defendants are without knowledge sufficient to form a belief thereof and therefore deny the same.

V

Answering paragraph XI of said amended bill of complaint, defendants admit that the average annual sales of oleomargarine in the state of Washington for many years last past have exceeded 5,000,000 pounds; that said oleomargarine was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state purchased said oleomargarine because of its lower cost, and that the total production of dairy butter in the state during 1931 was approximately 33,000,000 pounds.

They deny that at the time of the filing of this amended bill the wholesale and retail prices of butter in the state

Washington are the same as they were at the time of the [fol. 25] passage of said act and that they have been the same throughout the entire period since the passage of the act to the present time.

As to the remainder of the allegations in said paragraph contained, defendants are without knowledge sufficient to form a belief thereof and therefore deny the same.

VI

Answering paragraph XIII of said amended bill of complaint, defendants admit that at all times since the effective date of said act no revenue has been collected by the state of Washington under the provisions of said act.

They deny the allegation that since said date no sales subject to tax under said act could be made.

As to the remainder of the allegations in said paragraph contained, defendants are without knowledge sufficient to form a belief thereof, and therefore deny the same.

VII

Answering paragraph XIV of said amended bill of complaint, defendants are without knowledge sufficient to form a belief concerning the allegations contained in the first sentence thereof, and therefore deny the same.

As to the allegations contained in the last sentence thereof, defendants deny the same.

VIII

Answering paragraph XV of said amended bill of complaint, defendants admit that they have since the effective date of said act threatened and that they still threaten to enforce against complainant and others similarly situated the tax of 15 cents per pound on all oleomargarine sold by complainant in the state of Washington.

As to the remainder of the allegations in said paragraph contained, defendants deny the same.

[fol. 26] IX

Answering paragraph XVII of said amended bill of complaint, defendants admit that they state it is their intention to enforce chapter 23 against all sales of oleomar-

garine that may be made by complainant and all others similarly situated.

As to the remander of the allegations in said paragraph contained, defendants deny the same.

X

Answering paragraph XVIII of said amended bill of complaint, defendants

(1) Deny that said act deprives complainant of its property without due process of law or denies to it equal protection of the law in violation of the Fourteenth Amendment.

(2) Deny that said act deprives prospective customers or any one of their liberty freely to purchase or contract to purchase said food product for their own consumption.

(3) Deny that the taxes imposed by said act are not for a public purpose and that the purpose of the act is to prohibit the manufacture, importation or sale of oleomargarine in aid of the dairy industry.

(4) Deny that said act imposes an unjust or discriminatory burden upon complainant in respect to the carrying on of its interstate commerce in violation of paragraph 3, section 8, article I of the Federal Constitution.

(5) Deny that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises in violation of section 8, article I of the Federal Constitution.

For a further answer to the amended bill of complaint, the defendants say:

[fol. 27]

I

That dairying is the basic industry of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

II

That according to the official report of the state department of agriculture for the calendar year 1930 there were

in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000	pounds
Creamery butter	32,925,707	pounds
Ice-cream	3,598,466	gallons
Cheese	8,264,332	pounds
Evaporated and condensed milk	54,545,568	pounds
Value of by-products, condensed and powdered, skim milk, buttermilk and casein	$1,514,000.00	

III

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,463	pounds
Creamery butter	29,804,070	pounds
Ice-cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim-milk, buttermilk and casein	$3,203,086.85	

IV

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties; that said farm lands, equipment and properties of every kind are at the present time and for many years have been [fol. 28] contributing heavily to the support of the state government and its various political subdivisions while this complainant and all such other dealers in oleomargarine and other butter substitutes have escaped paying their proportionately just share of the tax burden; that chapter 23, Laws of 1931, was enacted for the purpose only of attempting to equalize to some extent the tax burden as between the dairy farmer and the dealer in oleomargarine and so-called butter substitutes; that there is a sufficient difference between butter and oleomargarine to justify the legislature in placing the latter in a single class for the purpose of imposing an excise upon its sale; that oleomargarine and butter are composed of entirely different elements; that the principal element of butter is butter fat produced by cows for which the market price at the present time is 28 cents a pound while oleomargarine consists basically of vegetable oil at a cost of 8 cents a pound and skim milk at the

ratio of 400 pounds thereof to 1,000 pounds of manufactured oleomargarine at a cost of 30 cents a hundredweight; that oleomargarine is produced at a cost of from 35 to 55 per cent of the cost of butter, and that notwithstanding this disparity between the cost of production and the enormous quantities of oleomargarine which were sold in the state prior to the enactment of chapter 23, Laws of 1931, such product contributed very little to the cost of government in the way of taxation.

V

Defendants verily believe and therefore aver it to be the fact that said chapter 23, Laws of 1931, was not intended to prohibit the business of dealing — oleomargarine and butter subsfitutes but was intended strictly and exclusively as a revenue measure; that one reason no taxable sales of such products have been made since the law was en- [fol. 29] acted is that due to economic conditions the price of butter has been so low as to discourage the use by consumers of oleomargarine and butter substitutes; that the retail price of butter at the present time is 28 cents per pound as against an average over the past five years of 38 cents per pound; that a second reason no taxable sales of such products have been made since the law was enacted is that dealers therein have anticipated a contest of the validity of such law and have made no active attempt to sell their products subject to the tax but have preferred to await the final outcome of such contest.

Wherefore, defendants pray that the amended bill of complaint be dismissed and that they be awarded their necessary costs and disbursements.

John H. Dunbar, Attorney General of the State of Washington; E. W. Anderson, Assistant Attorney General of the State of Washington, Temple of Justice, Olympia, Washington, Solicitors for Defendants. John B. Fogarty, Everett, Washington; Philip D. MacBride, Seattle, Washington, of Counsel.

[fol. 30] *Duly sworn to by Erle J. Barnes. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 31] In United States District Court

[Title omitted]

Order Convening Statutory Three-Judge Court—Filed Dec. 24, 1931

The above entitled matter came on before the undersigned judge of the District Court for the Western District of Washington, Southern Division, upon complainant's presentation of an application for an interlocutory injunction, pursuant to Section 266 of the Judicial Code of the United States, as amended by the Act of February 13, 1925; and, it appearing to the Court that the complainant by its verified amended bill of complaint presents a case requiring the undersigned district judge immediately to call to his assistance to hear and determine the application two other judges, one of whom shall be a Justice of the Supreme Court, or a Circuit Judge; now, therefore, it is hereby ordered, as follows:

1. The undersigned hereby calls to his assistance to hear and determine the said application for an interlocutory injunction, the Honorable Curtis D. Wilbur, United States Circuit Judge for the Ninth Circuit, and the Honorable Jeremiah Neterer, United States District Judge for the Western District of Washington.

2. That the said defendants appear and show cause, if any they have, on the 30th day of December, 1931, at 10 o'clock in the forenoon at the court room in Tacoma, why [fol. 32] an interlocutory injunction should not issue as prayed for in said amended bill of complaint.

The clerk is directed to mail a copy of this order to Judges Wilbur and Neterer.

Done at Tacoma, Washington, this 24th day of December, 1931.

Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.

[File endorsement omitted.]

[fol. 33] In United States District Court

[Title omitted]

Notice of Hearing—Filed Dec. 30, 1931.

To the Honorable John H. Dunbar, as Attorney General of the State of Washington, the Honorable Erle J. Barnes, as Director of Agriculture of the State of Washington, and the Honorable Roland H. Hartley, as Governor of the State of Washington:

You and each of you are hereby given notice, pursuant to the provisions of Section 266 of the Judicial Code of the United States, as amended, that the District Court of the United States for the Western District of Washington, Southern Division, has set for hearing and determination, in the Federal Court Room in the Federal Building in the City of Tacoma, State of Washington, on the 30th day of December, 1931, at ten o'clock in the forenoon of said day, the application for an interlocutory injunction in the suit brought by A. Magnano Company against John H. Dunbar, as Attorney General of the State of Washington, Erle J. Barnes, as Director of Agriculture of the State of Washington, and Roland H. Hartley, as Governor of the State of Washington, being Cause No. 458 in equity, to enjoin the enforcement of Chapter 23 of the Laws of 1931 of the State of Washington, relating to an alleged excise tax on butter-substitutes, by enjoining the acts and threatened [fol. 34] act of the said named defendants in enforcing the provisions of said act, upon the ground that the said statute violates the Constitution of the United States in the following manner:

(a) For the reason that the said act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process of law, and does and will deny to it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States;

(b) For the further reason that, in violation of the above mentioned Article XIV of the Amendments to the Constitution of the United States, said act deprives hundreds of

prospective customers of complainant of their liberty in freely purchasing or entering into contracts to purchase said food product for their own consumption;

(c) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of oleomargarine in aid of the dairy industry, a private business;

(d) For the further reason that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States;

(e) For the further reason that said act violates Article I, Section 8 of the Constitution of the United States in that [fol. 35] said act interferes with the power of Congress to levy and collect taxes, duties, imposts, and excises; all as more particularly set forth in the amended bill of complaint in this cause, a copy of which has heretofore been served upon you.

Dated this 24th day of December, 1931.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant.

Copy received December 24, 1931.

John H. Dunbar, Attorney General; E. W. Anderson, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 36] (Copy)

In United States District Court for the Western District of Washington, Southern Division

In Equity. No. 458

A. Magnano Company, a Corporation, Complainant,

vs.

John H. Dunbar, as Attorney General of the State of Washington; Erle J. Barnes, as Director of Agriculture of the State of Washington, and Roland H. Hartley, as Governor of the State of Washington, Defendants

Opinion (on Motion to Dismiss, etc.)

Opinion—Filed March 1, 1932

The complainant by amended bill of complaint states that it is a corporation of the state of Washington and resident therein, and paid the annual license fee to the state pursuant to the provisions of law; alleges official character of the defendants; that during its 1931 session the State Legislature passed an act entitled "An Act relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately." Chapter 23, Laws of Washington 1931.

It is alleged that the sole purpose of the act was to tax and burden the manufacture, interstate commerce in, and the sale of oleomargarine, in aid of the dairy industry of the state of Washington and protection against the competition of oleomargarine and "to completely destroy the [fol. 37] business of the complainant and all other persons, firms or corporations engaged in the manufacture within, the shipment in interstate commerce into, and the sale of oleomargarine within the State of Washington." That prior to the enactment of this act it was engaged in importing into the State of Washington from factories located outside, and selling oleomargarine in the state, an article of trade known as "Nucoa"; that it has complied

with the federal laws with relation to the classification and sale of its products; that the product was not sold in violation of any law of the state; that for many years past, and for a reasonable time after the passage of the act, the average annual sale of oleomargarine in the state had exceeded 2,000,000 pounds, of which approximately 1,500,000 pounds were shipped into the state; that prior to the passage of the act said article was sold in direct competition with dairy butter produced in the state; that many persons of moderate means purchased the same in preference to butter; that during the year 1926 the total production of dairy butter in the state was approximately 32,000,000 pounds, and that for a long time prior thereto and up to the present time production of butter in the state of Washington has been approximately at the same rate per annum; that the price of oleomargarine was 20 cents per pound, the wholesale price of dairy butter was 29 cents a pound, and the retail price 32 and 34 cents; that the retail price of oleomargarine was 25 cents; that since the effective date of said act no applications have been made to the Collector of Internal Revenue of the United States for wholesale or retail licenses under the federal statute; that up to the time of the passage of said act the complainant imported into the state said product (Nucoa) at a cost of 17 cents per pound [fol. 38] and sold to retailers for 20 cents a pound, who, in turn, sold it to the public for 25 cents a pound; that the defendant threatens to enforce the provisions of said act; that if a tax of 15 cents a pound is imposed all trade and commerce within the state of Washington will be destroyed; that the threatened enforcement has destroyed, and continues to destroy, plaintiff's traffic in said article.

It is alleged that said manufactured product is not taxable under the state law; that the act is violative of the Constitution of the United States and the amendments thereto by depriving the complainant of its property without due process of law and denies the equal protection of Article 14 of the Amendments; that it deprives complainants and their customers of freely purchasing and entering into contracts of purchase of said article; that the tax is not levied for public purposes, but the sole purpose is to burden this manufactured article; that it imposes an unjust and discriminatory burden upon the complainant in its relation to interstate commerce; that it violates Par. 3, Sec. 8, Art. 1,

of the Constitution of the United States, and interfere with the power of a municipality to levy and collect taxes, duties, imposts and excises, that it has no adequate remedy, and prays injunction, interlocutory and permanent.

The defendants have moved to dismiss on the ground that the bill does not state matters of equity entitling complainant to the relief prayed, or sufficient facts to afford such relief as was sought. With the motion to dismiss is filed an answer, in which it denies many of the allegations, and affirms on information and belief. The corporate entity of the defendant is admitted, denies all of the allegations with reference [fol. 39] [illegible] to constitutional impediment to the act, and by way of further answer says that during [illegible] the dairy industry of the state; that the state comprises 66,000 square miles of land, upon which are maintained 40,000 dairy farms, comprising an area of 250,000 acres of improved farm land, besides innumerable [illegible] farms devoted principally to the production of butter and other dairy products; that for the calendar year 1930 there were in the state 700,000 dairy cows producing 1,700,000,000 pounds of milk, 32,000,000 pounds of evaporated butter, 3,000,000 gallons of ice cream, 8,000,000 pounds of cheese, 50,000,000 pounds of evaporated and condensed milk, $15,000,000 worth of by-products, condensed and powdered skim milk, butter milk and casein; that for the year 1929 there were 700,000 dairy cows in the state, producing 1,700,000,000 pounds of milk, 29,800,000 pounds of evaporated butter, 3,000,000 gallons of ice cream, 6,700,000 pounds of cheese, 45,000,000 pounds of evaporated and condensed milk, $13,000,000 worth of by-products, condensed and powdered skim milk, butter milk and casein; that the total value of the cows and farm lands and equipment for their maintenance during each year was $183,000,000, not including creameries, condenseries and other similar properties; that the farm lands and equipment and properties of every kind are at the present time and for many years have been contributing heavily to the support of the state government and its various political subdivisions, while this complainant and all such other dealers in oleomargarine and other butter substitutes have escaped paying a just share of the tax burden; that the principal element of butter is butter fat produced by cows for which the market price at the present *price* is 28 cents a pound, [fol. 40] while oleomargarine consists basically of vegetable

oils at a cost of 8 cents a pound and skim milk at the ratio of 100 pounds thereof to 900 pounds of manufactured oleomargarine at a cost of $1.20; that oleomargarine is produced at from 35% to 55% of the cost of butter; that since the law has been enacted, due to economic conditions, the price of butter has been so low as to discourage the use by consumers of oleomargarine and butter substitutes; that the retail price of butter at the present time is 28 cents a pound, as against an average for the past five years of 28 cents per pound; that anticipatory to this litigation, the complainants have made no active attempt to sell their product.

[fol. 11] McMicken, Ramsey, Rupp & Schweppe, for complainants.

John H. Dunbar, Attorney General of the State of Washington, and E. W. Anderson, Asst. Attorney General of the State of Washington, for defendants. John B. Focarty, Esq., Philip D. MacBride, Esq., of counsel.

Before Wilbur, Circuit Judge, and Cushman and Neterer, District Judges, as a Statutory Three Judge Court.

Neterer, District Judge (after stating the facts):

At the time this case was argued it was stated that, with the final brief, a stipulation of facts would be filed, to the end that the issue may be disposed of upon the merits, avoiding the necessity of reconvening the three judge court. No stipulation has been filed. The respective parties, in their briefs, say that if the court denies the motion to dismiss, the facts will be stipulated.

Many of the pertinent facts arising, either directly or collaterally, in this case have been fully discussed in Best Foods, Inc. v. Welch, 34 Fed. (2) 682.

In view of the statements of the bill of complaint, which are denied by the answer but admitted by the motion to dismiss, and since Section 13 of the Act expressly exempts payment of the excise tax violative of interstate commerce "or the doing of any act which would constitute an unlawful burden upon the sale or distribution of butter substitutes, as herein provided, in violation of the Constitution or laws of the United States," it is felt that, after due consideration of the pleadings, the issue may not be fully and

[fol. 42] fairly disposed of by the court without the facts with relation to the disputed issues, either by stipulation or proof, and since the issue is largely the power of the state to tax, and as stated by the Supreme Court in Chicago G. W. Ry. Co. v. Kendall, 266 U. S. 94: "This court must respect in the fullest degree the sensitiveness of Congress in hedging about the sovereign power of taxation by the states and precluding temporary federal judiciary interference with it save in clear cases," we find ourselves unconvinced that the act complained of is so palpably unreasonable and arbitrary that we ought to grant an interlocutory injunction prayed for, but that the motion to dismiss should be denied, to the end that the court may be fully advised and substantial justice administered.

In denying the motion to dismiss, the motion for an interlocutory injunction is likewise denied, but in so doing we express no opinion of the merits of the controversy as they may develop upon the stipulation of the facts or upon final hearing. Weaver v. Palmer Brothers, 3 Fed. (2) 333.

[File endorsement omitted.]

[fol. 43] In United States District Court

[Title omitted]

Stipulation of Facts—Filed Sept. 13, 1932.

Come now the complainant and defendants, in the above entitled action and by and through their respective counsel stipulate that the following constitute the material facts therein:

Complainant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington and a resident and citizen of such state and has paid its annual license fee last due the state of Washington.

Defendant, John H. Dunbar, is the duly elected, qualified and acting attorney general of the state of Washington and a resident and citizen of said state and of the western district of Washington; defendant, Erle J. Barnes, is the duly appointed, qualified and acting director of agriculture of the state of Washington and a resident and citizen of

said state and of the western district of Washington; and defendant, Roland H. Hartley, is the duly elected, qualified and acting governor of the state of Washington and a resident and citizen of said state and of the western district of Washington.

[fol. 44] That this is a cause of civil nature in equity and that the matters in controversy arise under the constitution and laws of the United States and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

That the legislature of the state of Washington at its 1931 session regularly and duly enacted chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

That complainant for many years immediately prior and up to the enactment of said chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the state of Washington, an article of trade and commerce known as "Nucoa."

That said Nucoa is classified by the government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said government and over said entire period oleomargarine continuously has been and now is recognized by said government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

That all things have at all times been, and are, done necessary to make said Nucoa comply with all federal laws and regulations and all laws and regulations of the state of Washington relating to pure foods and the manufacture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other federal laws and regulations, and all laws and [fol. 45] regulations of the state of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has

been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been added, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times have been and are of good quality, and all oils and fats at all times have been and are refined at high temperatures so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is wholly original and independent product sui generis.

That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, [fol. 46] Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the state of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for

butter, but was sold as a wholly original and independent product sui generis; and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product sui generis.

That for many years last past, and continuously up to the effective date of said act, the average annual sales of oleomargarine in the state of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the state of Washington, and approximately 3,700,000 pounds were shipped into the state of Washington from other states in the United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the state of Washington for many years last past and up to March 9, 1931, has had the characteristics and [fol. 47] been sold under the conditions described in paragraphs VIII, IX and X of the amended bill of complaint. That said oleomargarine of complainant and all other oleomargarine sold in the state of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production of dairy butter in the state of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to the present time the production of butter in the state of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the state of Washington was twenty cents a pound and the wholesale price of dairy butter in the state of Washington was thirty-two cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the state of Washington was twenty-five cents a pound, and the retail price of butter in the state of Washington was from thirty-five to thirty-seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the state of Washington were approxi-

mately the same as they were at the time of the passage of said act, and were approximately the same throughout the entire period since the passage of the act and up to the filing of the amended bill; that, today, on the 13th day of September, 1932, the wholesale price of butter in the state of Washington is twenty-two cents a pound; and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant today is twelve [fol. 48] cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the state of Washington at fourteen cents a pound, and said retail dealers in the state of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and today there has been a gradual and continuous decline of both said butter and oleomargarine prices down to the present date in the same general proportion as that above set forth.

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the state of Washington of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the state of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the state of California and sold in the state of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of

[fol. 19] oleomargarine by the complainant in the state of Washington were as follows:

Year	Pounds Sold
1929	2,022,762
1930	2,176,056
1931 up to March 9	145,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the state of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the state of Washington for use and sale in the state of Washington, or imported into or sold in the state of Washington any such oleomargarine.

That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the state of Washington under the provisions of said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the state of Washington for wholesale or retail licenses under the federal statutes to sell oleomargarine in the state of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the state of Washington under said federal statutes since such date, nor has the government of the United States derived any revenue from sales of oleomargarine within the state of Washington since such date.

That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective, complainant imported into the state of Washington said [fol. 20] Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the state of Washington at twenty cents per pound, who, in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, and the price per pound at which retail dealers in the state of Wash-

ington could resell to the general public has remained the same, and that since the date of filing the amended bill down to the date of this stipulation there has been a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacturing, importing and/or selling oleomargarine within the state of Washington.

That defendants have at all times since the effective date of Chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine sold by them within the state of Washington. That the defendants states that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding. That the complainant has no adequate remedy at law.

[fol. 51] That dairying is one of the basic industries of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,806 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

That according to the official report of the state department of agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,791,384,000 pounds
Creamery butter	32,925,767 pounds
Ice cream	3,598,466 gallons
Cheese	8,264,332 pounds
Evaporated and condensed milk	54,545,568 pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,0[illegible] 00

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403 pounds
Creamery butter	29,804,970 pounds
Ice-cream	5,425,523 gallons
Cheese	6,788,283 pounds
Evaporated and condensed milk	41,610,900 pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

Dated this 13th day of September, 1932.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Complainant. John H. Dunbar, E. W. Anderson, John B. Fogarty, Philip D. MacBride, Solicitors for Defendants.

[fol. 52] [File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

Statement of Evidence—Filed Oct. 21, 1933

Be it remembered, that the above entitled cause came on regularly for trial before the above entitled court, duly convened pursuant to Section 266 of the Judicial Code of the United States and consisting of the following judges, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, sitting in equity, on the 13th day of September, 1932, the complainant appearing by its counsel, Alfred J. Schweppe, of McMicken, Ramsey, Rupp & Schweppe, and the defendants appearing by E. W. Anderson, Assistant Attorney General of the State of Washington, and John P. Fogarty and Philip D. MacBride.

Said hearing was had upon the stipulation of facts dated September 13, 1932, signed by the solicitors for the complainant and defendants, respectively, and upon the following proceedings and evidence:

Judge Wilbur stated that he understood counsel wished to present evidence that would take about fifteen minutes, [fol. 54] and it was stated to him that the contesting parties had prepared a written stipulation of facts, executed by counsel, which was thereupon filed.

JOHN A. McGREGOR was then called as a witness on behalf of the complainant, and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

My name is John A. McGregor. I am associated as vice president with A. Magnano Company, the complainant in this case. That company has in past years, up to March 9, 1931, been engaged in the sale of oleomargarine, commonly known in the trade as "Nucoa." The complainant in this action has not since March 9, 1931, sold any oleomargarine in the State of Washington, and that is true right down to the present date. If A. Magnano Company had put on, in addition to the import price which is set forth in the agreed statement of facts, the fifteen cents a pound tax, the complainant could not have sold any oleomargarine in the State of Washington since March 9, 1931, down to the present date.

Judge Wilbur: Why not?

The Witness: It could not have been sold without it would have been higher than butter, with the tax added on to our cost.

Thereupon the witness continued, on direct examination:

We could not have sold a pound of oleomargarine or Nucoa during this period except at a loss. We have made no attempt whatsoever to sell it at a loss. I know of no other wholesaler who has sold any oleomargarine in the State of Washington since March, 1931. We could not sell it because the tax prohibited us from selling it. It made it higher than the competition of butter.

[fol. 55] Cross Examination:

On cross examination by Mr. Anderson, Assistant Attorney General of the State of Washington, the witness testified as follows:

My company has not tried to sell any oleomargarine in the State of Washington since the act was passed, because it would have been impossible to have sold it with the tax added. That is the only reason. If we could have sold it at a profit, we would have been happy to sell it.

Whereupon the complainant rested its case.

Dr. Herbert Prior was called as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct Examination:

My name is Dr. Herbert Prior. I am Supervisor of the Dairy and Livestock Division of the Department of Agriculture of the State of Washington.

Over the objection of complainant's counsel, the witness was permitted to testify as follows:

I have made a survey for the purposes of this case with reference to the amount of property taxes paid by the dairy farmers of the State of Washington. I can give you the results of our survey. The real estate taxes paid by the farmers of the State of Washington on properties used to raise forage and feed for their cows are $8,436,482, and on personal property $2,402,272. Those are the taxes they report paying.

[fol. 56] Cross-examination:

On cross-examination by Mr. Schweppe, the witness testified as follows:

I arrived at these figures by sending out questionnaires to the dairy farmers of the State of Washington. I identified the dairy farmers as those who had cows, and we have made a hundred per cent test of all the cattle in this state for tuberculosis, and we have that record. What I am recording in this statement I have just furnished to the court is simply the voluntary statement furnished to me by farmers in response to this inquiry that I sent out.

Redirect examination:

On redirect examination by Mr. Anderson, the witness testified as follows:

There are approximately 60,000 dairy farmers in this state.

JULIUS A. HALL was called as a witness on behalf of the defendants, and, having been first duly sworn, was examined and testified as follows:

Direct examination:

My name is Julius A. Hall. I reside in Seattle. For the past few years I have been engaged in the creamery business and in the oleomargarine business. I was in the business of manufacturing oleomargarine ten years in the city of Seattle.

COLLOQUY

Judge Wilbur: What do you want to prove by this witness?

Mr. Anderson: I offer to prove, if the Court please, by this witness the production cost of the article known as oleomargarine as alleged in our affirmative answer and not included in the stipulation.

[fol. 57] Judge Wilbur: I think that if counsel went into that question you might take a good deal of evidence and a good deal of time. What do you contend the cost is?

Mr. Anderson: We contend that the production cost is on present figures about six cents a pound.

Judge Wilbur: I think there is evidence that it is about twelve so far.

Mr. Anderson: I don't think there is any allegation as to that in the bill of complaint. Our purpose is merely to show a basis for classifying this property separate and apart from butter. This man——

Judge Wilbur (interrupting): That has been recognized by the courts, and by the legislature, and the classification has been sustained.

Mr. Anderson: I realize, if the Court please, that the classification has been sustained.

Judge Wilbur: My recollection is that they did affirmatively allege the cost of production in the complaint. Is that not true?

Mr. Schweppe: No. We allege in the complaint the cost to this complainant of oleomargarine laid down in the State of Washington imported from California and from other states. The fact that counsel is seeking to prove I think is immaterial, if it is solely for the purpose of proving classification, because that we would concede. There is a basis for classifying oleomargarine separately from butter entirely independent of such proof as this, and for the purpose of shortening the proceedings I make the objection.

Mr. Anderson: If the Court please we won't urge the point.

Judge Cushman: You say you do not urge it?

[fol. 58] Mr. Anderson: We won't urge it or press it.

(Witness excused.)

Mr. Anderson: We rest.

Whereupon the defendants rested their case, testimony closed.

Judge Wilbur: I understand that counsel are prepared to submit the case on the briefs already filed in the case, together with the stipulation of facts filed and the evidence which has just been introduced?

Mr. Anderson: Yes, your Honors.

Judge Wilbur: Court is adjourned.

STIPULATION AS TO STATEMENT OF EVIDENCE

It is hereby stipulated that the foregoing constitutes a true and complete statement of the evidence taken in the above entitled cause, and that the said statement may be allowed and approved and ordered filed in the above entitled cause.

Dated this 18th day of October, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant. G. W. Hamilton, Attorney General of the State of Washington, E. P. Donnelly, Assistant Attorney General, Attorneys and Solicitors for Defendant.

[fol. 59] ORDER APPROVING STATEMENT OF EVIDENCE

On this 21st day of October, 1933, the foregoing statement having been presented, the same is hereby in all things allowed and approved as a true and complete statement of the evidence taken in the above entitled cause, and the same is hereby ordered filed as a "Statement of the Evidence" to be included, together with the Stipulation of Facts therein referred to, dated September 13, 1932, in the record on appeal in the above entitled cause, as provided in paragraph (b) of Equity Rule 75.

Done at Tacoma this 21st day of October, 1933.

Edward E. Cushman, District Judge.

[File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 458

A. MAGNANO COMPANY, a Corporation, Complainant,

vs.

JOHN H. DUNBAR, as Attorney General of the State of Washington, Erle J. Barnes, as Director of Agriculture of the State of Washington, and Roland H. Hartley, as Governor of the State of Washington, Defendants.

Before Wilbur, C. J., and Cushman and Neterer, D. JJ.

OPINION—Filed Jan. 17, 1933

In — Fed. (2) —, the court stated that it was "unconvinced that the act complained of [see pages A, B and C in footnote] is so palpably unreasonable and arbitrary that the interlocutory injunction should be granted."

Now, at trial on stipulation and evidence it appears that the complainant prior to the effective date of the act complained of, requiring payment of an excise tax of fifteen cents per pound on all butter substitutes sold within the state, was engaged as a line in its business in importing into the state and selling within the state and manufactur-

ing within the state "Nucoa," an article classified as oleomargarine, and had complied with all of the federal and state laws and regulations relating to pure food and manufacture and sale thereof; that the average sales per annum of "Nucoa" in the state of Washington have exceeded 5,000,000 pounds, of which 1,300,000 pounds were manufactured intrastate; that the total production of dairy butter intrastate during the year 1930 was approximately 33,000,000 pounds, and the retail was 32 to 37 cents per pound; that on the 13th day of September, 1932, approximately the date of trial, the wholesale price of butter in the state was 22c per pound, and the retail price 24 to 26c per pound; that the import price of Nucoa was 12c per pound and sold by the wholesaler at 14c, and the retailer at 17c; and that there has been a continuous decline in the price of both butter and oleomargarine; that complainant had a regularly established trade and the net profits from the sale of Nucoa exceeded the sum of $20,000.00 net per annum; that since the effective date of said act, no importations or sales have been made; that before the effective date, complainant imported into the state said commodity at 17c and sold it at 20c a pound to the retail dealer, who, in turn, sold it at 25c a pound; that dairying is one of the basic industries of the state, consisting of 40,800 dairy farms, comprising in excess of 250,000 acres of improved farm land, besides innumerable lesser farms devoted partially to the production of butter and other dairy products; that the total value of cows and equipment necessary for their maintenance was $183,600,000, not including creameries, condenseries and other similar property. The tax paid by the dairy farmers "on property used to raise forage and feed for cows" was $8,436,482, and on personal property $2,402,272; and upon trial the defendant offered to show Nucoa oleomargarine could be manufactured at 6c a pound, but over the objection of defendant, upon the ground of immateriality, the offer was withdrawn.

The complainant claims the act deprives it of its property ($20,000 profit per annum) without due process and is violative of the interstate commerce clause.

[fol. 62] It is contended that the sole purpose is to burden the manufacture, interstate commerce in, and the sale of oleomargarine, in aid of the dairy industry in the state and

destroy the business of complainant in the shipment into and sale of oleomargarine within the state.

McMicken, Ramsey, Rupp & Schweppe, for complainant; A. M. Davis, W. R. Brown, of Counsel.

John H. Dunbar, Attorney General of State of Washington; E. W. Anderson, Asst. Atty. General of State of Washton; John B. Fogarty, Philip D. MacBride, for Defendants.

Before Wilbur, C. J., and Cushman and Neterer, D. J.J.

Neterer, D. J. (after stating the facts as above):

The state has full power to prescribe any system of taxation, judged in the light of its practical application to the affairs of men as usually conducted, not so arbitrary or extravagant as to constitute an abuse of power, which in the judgment of its legislators is necessary for its people. Southwestern Oil Company v. Texas, 217 U. S. 114, 126; Mountain Timber Company v. State of Washington, 243 U. S. 219, 237; North Laramie Land Company v. Hoffman, 268 U. S. 276. And this court may not inquire into the motives of the legislature in enacting the law. Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 161; Arizona v. California, 283 U. S. 423, 455. The court must presume that the challenged act was enacted in good faith and be not by its necessary and natural operation destructive of rights secured by the Constitution. Lane v. Barber, 136 [fol. 63] U. S. 313. And considering such operation, the court is not limited to the mere phrase, but looks beyond the letter in such cases. Pleasant Twp. v. Aetna Life Ins. Co., 138 U. S. 67, 75; Lochner v. New York, 198 U. S. 45, 65; Mountain Timber Co. v. Washington, supra.

The court may judicially notice facts and matters shown with facts established by the evidence. Weaver v. Palmer Bros. Co., 270 U. S. 402, 410. See, also, Quong Wing v. Kirkendall, 223 U. S. 59, 64. Sale in interstate commerce is not forbidden by the act; nor is the introduction of oleomargarine, which is not affected, regulated. Shollenberger v. Pennsylvania, 171 U. S. 1, 19; nor is its practical effect prohibitory. Collins v. New Hampshire, 171 U. S. 30, 33. There is no tax on sale of oleomargarine. It may be introduced and sold in the state without tax by moving in interstate commerce from without the state direct to the con-

sumer within the state. The tax is assessed on the dealer, the amount of tax being measured by the quantity sold, and is operative only when the interstate commerce relation to the oleomargarine is ended. To carry on trade within the state an excise tax is fixed, and this may be done, if not "so extravagant or arbitrary as to constitute an abuse of power." Mountain Timber Co. v. Washington, supra, at page 237.

The act in issue is unlike any of the numerous cases cited. It has relation to public revenue and local welfare rather than regulatory of local business, as in Real Silk Hosiery Mills v. Bellingham, 1 Fed. (2) 934; and as In Re Bok (District Court of Appeals, California, not reported). Nor does a municipal ordinance bear the same status as to judicial review as a state statute. Roach v. Ephen, 99 So. 609; State v. Wilson, 168 Pac. 679. Nor does the act [fol. 64] prohibit business under penalty, as Adams v. Tanner, 244 U. S. 590; see, also, Weaver v. Palmer Bros. Co., 270 U. S. 402, 410.

The instant issue must rest upon conditions of local welfare in the light of the reasonableness and with relation to the profits on oleomargarine and butter, public revenue, and the status of the parties, and the common good; and be predicated on a reasonable basis on the existing status in the disparity of production cost and reasonable profit and value of oleomargarine and butter, and the reasonable necessity of the tax in equality of right for the common good.

"The general legislative purpose is plain and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject." Williams v. Fears, 179 U. S. 270.

"But there is still another difficulty in the way of holding this tax invalid. Had this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is so much that it would not reasonably have been intended to produce revenue?" Sperry & Hutchinson Co. v. Blue, 202 Fed. 82 (C. C.).

Chief Justice Marshall, in McCulloch v. Maryland, 17 U. S. 315 (4 Wheat.):

"The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government the right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituent over their representative, to guard them against its abuse."

[fol. 65] And the same jurist in Providence Bank v. Billings, 29 U. S. 514 (4 Pet.) 9 Curtis 171, referring to the taxing power, says:

"It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies * * *. This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally."

In Austin v. Boston, 74 U. S. 694 (7 Wall.):

"The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."

In Spencer v. Merchant, 125 U. S. 345:

"The power to tax belongs exclusively to the legislative branch of the government. * * * 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.'"

In McCray v. United States, 195 U. S. 27, Chief Justice White said:

"It is, however, alleged, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the constitution will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse of one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

In Kehrer v. Stewart, 197 U. S. 60, in discussing an occupation tax upon meat dealers, it is said:

"What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state [fol. 66] legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here."

And on a federal tobacco tax, in Patton v. Brady, Adm'x, 184 U. S. 608, 623:

"It is not the province of the judiciary to inquire whether the exercise is reasonable in amount, or in respect to the property to which it is applied. These are matters in respect to which the legislative determination is final."

Mr. Justice Day, in Flint v. Stone, Tracy Co., 220 U. S. 107, said:

"It is urged that this power can be so exercised by Congress as to practically destroy the right of the states to

create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in McCulloch v. Maryland, that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the power of Congress."

And held a corporation tax not void as lacking due process under the Fifth Amendment.

In Alaska Fish Co. v. Smith, 255 U. S. 44, in re excise tax of $2.00 a barrel or ton upon per on manufacturing fish oil, fertilizers, etc., and

"The complainant alleges that the tax will prohibit and confiscate the plaintiff's business. * * * Even if the tax should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk."

In The Child Labor Tax Case, 259 U. S. 20, the court, among other things, said, as far as applicable here:

"If it were an excise on a commodity or other thing of value we might not be permitted under the previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. * * *

"And with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive."

[fol. 67] In Veazie Bank v. Fenno, 75 U. S. 533 (8 Wall.), the court said:

"It will be observed that the sole objection to the tax there was its excessive character. Nothing else appeared on the face of the act."

And held a ten per cent tax on currency constitutionally warranted. As in the instant case, the only matter urged is excessive tax. The tax operated with the same effect throughout the state, and is therefore uniform. Patton v. Brady, Adm'x, 184 U. S. 608, 628. The act being for revenue, the court cannot consider the reasonableness of the amount. Spencer v. Merchant, supra. The distinction between a regulatory tax and one solely for revenue is that

the regulatory tax must bear a reasonable relation to cost of such regulation. Standard Oil v. Graves, 249 U. S. 389; Best Foods v. Welch, 31 Fed. (2) 682. The reasonableness of the revenue act is not open to judicial review unless the organic law is violated, but the reasonableness of a municipal ordinance, except where it conforms strictly to express and specific legislative grant, is more amenable to judicial review and determination. Rogeh v. Ephen, 90 So. 609 (Fla.); State v. Wilson, 189 Pac. 679 (Kans.).

The court must presume that the legislators acted in the exercise of their official responsibility and, by public authority within the limitations of the organic law. United States v. Castillero, 67 U. S. 1, 340; see, also, United States v. Arredondo, 31 U. S. 691, 728 (6 Pet.). And the court may not inquire into the legislative motive. United States v. Des Moines, etc. Co., 142 U. S. 510; Arizona v. California, 283 U. S. 423. And in considering the unconstitutionality of the act, the court must recognize that the Constitution, the soul of the nation, is an organism of increasing growth and [fol. 68] vitality, expansive with the unfolding necessities of the people for the common good, and, as said by Chief Justice Marshall in McCulloch v. Maryland, 17 U. S. 315, at 413 (4 Wheat.), "intended to endure for ages to come, and, consequently, be adapted to the various crises of human affairs," and comprehended changed conditions arising, inspired by many generations having relation to new issues of adjustment, not present, perhaps, in the instant form in the minds of the Constitution makers, in the general unfolding of the problems of our civilization, but within expansive thought and spirit, contributing to a balance for the common good, and that the agriculture, of which dairying is a part, and the machine synthetic chemical or combination of natural products enterprise may be balanced in proper relation. "No nation can bear wealth that is not intelligent first" (Beecher). And while differentiation between the artificial and the natural, the man of annual net profit of more than $20,000.00 from sale of 5,000,000 pounds of oleomargarine, not while in interstate commerce, but after it became at rest in the state, and the man of production and sale of 38,000,000 pounds of butter, "bowed by the weight of centuries he leans upon his cane and gazes on the ground: the emptiness of the ages in his face, and on his back the burden of the world * * * (this over-

draws the condition somewhat, but challenges the thought to the issue) may not have been so vivid as when the state legislature sought to, in some degree, balance the burden, and "give back the upward looking and the light" and inspire in the farmer courage and hope of at least partial relief. The thought, however,

"Wealth in gross is death, but life diffus'd;
As poison heals, in just proportion used;
In heaps, like ambergris, a stink it lies,
But well dispersed, in incense to the skies" (Pope)

[fol. 69] may have been present.

The dealer, by the Constitutional Amendments, is not guaranteed an exorbitant profit, but is entitled to reasonable profit; he is not entitled to special privilege, but is entitled to equal right; is not entitled to tax exemption while the dairyman is taxed to support the government for his and the dealer's protection. Each must pay taxes in equal right for mutual benefit. May the court relieve the plethora of $20,000 annual profit of the dealer on the sale of Nucoa, one fourth of which is from intra state manufacture, from tax contribution and burden the little or no profit of the farmer by exacting taxes; give to the dealer that hath large profit, and take from the farmer that hath little or no profit, even that which he seemeth to have; and do so without proof that the dealer's profit is a reasonable return on capital invested.

The tax, while evidently not imposed to prevent practical monopoly of business or as a regulatory measure, is a measure in aid of public revenue. The omission of the act, however, could obviously leave a status which could create such a monopoly as might compel the retirement of the cow from the competitive field and take from the state nearly $11,000,000 taxes annually; and from human life, dairy products, without which "the race cannot survive."

The dairyman pays annual taxes of $10,838,754, and produces 33,000,000 pounds of butter and some by-products. The dealer in oleomargarine sells in competition more than 5,000,000 pounds of oleomargarine, or practically 1 6 as much as the dairyman of butter, and enjoys the privilege of $20,000.00 net annual income without contributing to the

maintenance of state and local government which gives it protection and whose benefits it enjoys.

[fol. 70] There is no evidence that dealing in oleomargarine is plaintiff's exclusive business, the inference is that such dealing is a line among others in its general business.

In The Best Foods, Inc. v. Welch et al., 34 Fed. (2) 682, 686, it was said.

"This court has no interest in the policy of the state revenue laws, so long as equal protection is not denied, and is reasonable and not purely arbitrary. Nor is the Fourteenth Amendment concerned with state legislation where there is a real difference and it will not create an artificial equality. Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 193, 56 L. Ed. 350. There is no equality between the cow on the farm and her natural product, 'butter,' and the manufacturing plant * * * and its artificial product, 'oleomargarine.' Each product has food value, but composed of different elements, and the difference determines between them as food, and is a just basis for classification. 'Any classification is permissible which has a reasonable relation to some permitted end of governmental action' * * * of the classification is reasonably founded in the 'purposes' and policy of taxation.' Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 85, 67 L. Ed. 237; Watson v. State Comptroller, 254 U. S. 122, 41 S. Ct. 43, 65 L. Ed. 170. The state 'may impose different specific taxes upon different trades and professions * * *.' Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 535, 33 L. Ed. 892.

"The act in issue exacts a definite license fee. It is significant that this money is placed in the general fund of the state and appears in the relation of a taxation measure, and as such may be sustained, and if for revenue the court cannot consider the reasonableness of the amount. Cooley on Taxation, Vol. 1, Sec. 29. The exercise of acknowledged power to tax may not be scrutinized by the court. The responsibility rests upon the legislature, and if unreasonably exercised, redress rests with the people."

The excise tax in the instant case bears the same relation as the license fee.

The act in issue specifically excludes operation against the interstate commerce clause, and no tax is exacted until

the article has become at rest and wholly within the jurisdiction of the state for the purposes of taxation, and the manufacture of 1,300,000 pounds of oleomargarine within the state per annum is not shown to be prohibitive with [fol. 71] relation to reasonable profit on investment. The profit on sale intrastate is approximately one-fourth, or $5,000.00. The burden is upon the plaintiff to sustain the prohibitive character. The arbitrary wholesale price of the product on its importation into the state is no proof of cost of manufacture and reasonable profit of local product. The claim of the plaintiff that it has created an established trade within the state which produced a net profit of more than $20,000.00 annually derived from imported articles not affected by the act, and the local manufacture, and that the tax assessed is prohibitive and destroys the business, is not sustained by the proof. The plaintiff may, without tax, supply its customers by delivery direct from the plant to the consumer. Nor is the fact that it has ceased operation since the effective date of the act, and that no revenue has been derived by the state by reason of such act, persuasive upon this record. The manufacturer in the state and shipper into the state, and the distributor within the state, may not, by their conduct arbitrarily control the legislative act of the sovereign state against the common good by fixing a price of intrastate manufactured articles, irrespective of the cost of production, and "strike" or quit trading as against legislation fixing a tax upon dealers of oleomargarine within the state in aid of public revenues.

There is no proof that the oleomargarine cannot be manufactured at such price as would return the plaintiff a reasonable profit upon its investment after the payment of the tax required by the state law. The arbitrarily fixed price which produced the $20,000.00 net annual income may not rebut the presumption in favor of the reasonableness of the act and against arbitrary conduct of the legislators. [fol. 72] The court must presume that the legislators made due inquiry into the cost of production, the reasonable profit and the common good, and bearing in mind this presumption, the court is not required to overlook the offer of defendants to prove the manufacturing cost of oleomargarine to be six cents per pound, and while the offer is not evidence, the unwillingness of plaintiff for the court to be

advised does not take from the presumption, which must prevail.

That the oleomargarine is placed in a class by itself does not appear to be challenged.

The state excise tax does not burden plaintiff's business, if delivered from the plant direct to the consumer, thus only affecting interstate commerce incidentally and remotely, and is valid, where it is not clear that it is imposed for the covert and ulterior charged purpose. Hump Hairpin Co. v. Emmerson, 258 U. S. 290.

Placing in competition the farmers with 306,000 cows in the state, with a butter production of 33,000,000 pounds and some by-products, with the plaintiff engaged in selling in the state more than 5,000,000 pounds of oleomargarine per annum (aside from others so engaged), requiring the cow and the farm which supports her to contribute to the maintenance of state and local government taxation, and affording protection to the dealer in the state of oleomargarine without contributing to the public tax for such support, challenges the state's power to keep alive. Taxation, under the general taxing power, rests wholly within the discretionary power of the state. State v. Nelson, 36 Ida. 713, 213 P. 358; Standard Oil Co. v. Graves, 249 U. S. 389; Best Foods v. Welch, 34 Fed. (2) 682.

If the intelligent, patriotic duty of the state legislators, [fol. 73] in equality of right and for the common good, deem it wise to more equally distribute the burdens of public revenue, and relieve the owners of the cows and dairy utilities of some of the $11,000,000 tax paid per annum, by requiring the dealers in oleomargarine to contribute to the expense of the government whose protection they receive and whose benefits they enjoy, by requiring payment of an excise tax on sales in the state by the dealer, the court should give critical consideration to incentive to industry within the state to the policy and purpose of taxation within constitutional limitations to the state's well being and for the common good. The equality clause is not affected where the requirements are impartially applied to all elements of a class, and similarly circumstanced persons. State v. Horn, 27 Ida. 782. The state may tax property moved in interstate commerce after such property has become at rest therein and before sale. Woodruff v. Parham, 75 U. S. 123 (8 Wall.); Brown v. Houston, 114 U. S. 622;

Askren v. Continental Oil Co., 252 U. S. 444; Best Foods v. Welch, supra.

The court may judicially notice the distressing condition of agriculture, present in the mind of the legislators, not only in this state, but throughout the nation, and the unusual economic conditions at the time and since the effective date of the act, and that by reason of the excessive burdens there exists an unrest which may not be superficially passed, and in view of the burden placed upon the complainant to establish unlawful the tax, we find ourselves unconvinced that the act complained of is so palpably unreasonable and arbitrary as to be forbidden; and, after fully and fairly considering the facts and stipulated evidence in this case, we are convinced that the act is consti-
[fol. 74] tutionally sound and the case should be dismissed.

And it is so ordered.

[fols. 75–77] [Chapter 23—Excise Tax on Sale of Butter Substitutes—Omitted. Printed side pages 15-18, ante.]

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Wilbur, C. J., and Cushman and Neterer, D. JJ.

CONCURRING OPINION—Filed Jan. 17, 1933

CUSHMAN, District Judge:

I concur in the conclusion reached in the foregoing opinion that the bill of complaint in this suit should be dismissed.

The act of the legislature attacked became effective March 9th, 1931. The bill of complaint herein was filed September 18th, 1931. The stipulation of facts was filed September 13th, 1932.

If it has been clearly shown that the law was passed in order to prohibit or prevent the sale of oleomargarine in the State of Washington, with no bona fide purpose on the part of the legislature to raise revenue, it may be conceded that the law is invalid and complainant entitled to an in-

junction, providing it has been shown that it would suffer if the provisions of the act were enforced.

It has been contended upon the part of the complainant that such showing has been made; that such a purpose is to be inferred from the amount of the tax—fifteen cents [fol. 79] per pound; the prevailing prices of butter and Nucoa—a brand of oleomargarine dealt in by the complainant—at the time of the enactment and the fact that since the act became effective no sales of oleomargarine subject to the tax provided by the act have been made and no revenue received by the State of Washington under the act.

In view of the short time which has elapsed since the act became effective, coupled with the low range of prices in farm products which have prevailed during the period in question, an extraordinary condition of which the court will take notice (Atchison, Topeka & Santa Fe Railway Co. vs. United States, 284 U. S. 248), and the effect of such low prices upon the advisability of attempting to market a butter substitute with a fixed tax upon it in a very considerable amount, an inference of such an intent on the part of the legislature is unwarranted. The time which has elapsed does not constitute a test period of reasonable length under the conditions which have existed.

It is also to be noted that there has been nothing shown in this case as to the cost of the material used in making oleomargarine nor the cost of its manufacture or transportation, nor the cost of marketing it at wholesale or retail.

The stipulation of facts recites:

"That complainant for many years immediately prior and up to the enactment of said chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to *bakeries, confectioners, grocers, institutions and other persons* in the state of Washington, an article of trade and commerce known as 'Nucoa'." (Italics mine.)

The act clearly shows that it was not intended to forbid [fol. 80] interstate sales of oleomargarine. No showing has been made as to whether complainant's interstate sales have increased since the law became effective and to what

extent. With the law taxing infrastate sales and leaving interstate sales untaxed it is quite possible that the law has benefitted rather than injured the complainant insofar as its customers are of the description particularly pointed out above.

[File endorsement omitted.]

[fol. 81] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Aug. 29, 1933

The above-entitled cause came on for final hearing on September 13, 1932, before this court, consisting of three judges, pursuant to Section 266 of the Judicial Code of the United States, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, and the court having considered the stipulation of facts herein and the additional evidence introduced by the parties hereto, and having heretofore rendered its opinion in this cause, as reported in 2 F. Supp. 417, the court now makes the following

Findings of Fact

I

Complainant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington and a resident and citizen of such state and has paid its annual license fee last due the state of Washington.

[fol. 82] II

Defendant G. W. Hamilton is the duly elected, qualified and acting attorney general of the state of Washington and a resident and citizen of said state and of the western district of Washington; defendant Walter J. Robinson is the duly appointed, qualified and acting director of agriculture

of the state of Washington and a resident and citizen of said state and of the western district of Washington; and defendant Clarence D. Martin is the duly elected, qualified and acting governor of the state of Washington and a resident and citizen of said state and of the western district of Washington.

III

That this is a cause of a civil nature in equity and that the matters in controversy arise under the constitution and laws of the United States and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

IV

That the legislature of the state of Washington at its 1931 session regularly and duly enacted chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

V

That complainant for many years immediately prior and up to the enactment of said chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the state of Washington, an article of trade and commerce known as "Nucoa."

[fol. 83]

VI

That said Nucoa is classified by the government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said government and over said entire period oleomargarine continuously has been and now is recognized by said government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

VII

That all things have at all times been, and are, done necessary to make said Nucoa comply with all federal laws

and regulations and all laws and regulations of the state of Washington relating to pure foods and the manufacture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other federal laws and regulations, and all laws and regulations of the state of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been added, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times have been and are of good quality, and all oils and fats at all times have [fol. 84] been and are refined at high temperature so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product sui generis.

VIII

That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon, in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing

that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the state of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

[fol. 85]

IX

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product sui generis; and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product sui generis.

X

That for many years last past and continuously up to the effective date of said act, the average annual sales of oleomargarine in the state of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the state of Washington, and approximately 3,700,000 pounds were shipped into the state of Washington from other states in the United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the state of Washington for many years last past and up to March 9, 1931, has had the characteristics and been sold under the conditions described in paragraphs VII, VIII and IX of these findings of fact. That said oleomargarine of complainant and all other oleomargarine sold in the state of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production

of dairy butter in the state of Washington during the year [fol. 86] 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to September 13, 1932, the production of butter in the state of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the state of Washington was twenty cents a pound and the wholesale price of dairy butter in the state of Washington was thirty-two cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the state of Washington was twenty-five cents a pound, and the retail price of butter in the state of Washington was from thirty-five to thirty-seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the state of Washington were approximately the same as they were at the time of the passage of said act, and were approximately the same throughout the entire period since the passage of the act and up to the filing of the amended bill; that on the 13th day of September, 1932, the wholesale price of butter in the state of Washington was twenty-two cents a pound, and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant on the 13th day of September, 1932, was twelve cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the state of Washington at fourteen cents a pound, and said retail dealers in the state of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and September 13, 1932, there was a gradual and continuous decline of both said butter and oleomargarine prices down to said September 13, 1932, in the same general proportion as that above set forth.

[fol. 87] XI

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the state of Washington of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the

state of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the state of California and sold in the state of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of oleomargarine by the complainant in the state of Washington were as follows:

Year	Pounds Sold.
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same, has not imported from the state of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within [fol. 88] the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the state of Washington for use and sale in the state of Washington, or imported into or sold in the state of Washington any such oleomargarine.

XII

That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the state of Washington under the provisions of said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the state of Washington for wholesale or retail licenses under the federal

statutes to sell oleomargarine in the state of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the state of Washington under said federal statutes since such date, nor has the government of the United States derived any revenue from sales of oleomargarine within the state of Washington since such date.

XIII

That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective complainant imported into the state of Washington said Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the state of Washington at twenty cents per pound, who in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, [fol. 89] and the price per pound at which retail dealers in the state of Washington could resell to the general public has remained the same, and that since the date of filing the amended bill down to September 13, 1932, there was a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacturing, importing and/or selling oleomargarine within the state of Washinton.

XIV

That defendants and their respective predecessors in office have at all times since the effective date of chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine sold by them within the state of Washington. That the defendants state that it is their intention to enforce said chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XV

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding. That the complainant has no adequate remedy at law.

XVI

That dairying is one of the basic industries of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides [fol. 90] innumerable lesser farms devoted partially to the production of butter and other dairy products.

XVII

That according to the official report of the state department of agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000	pounds
Creamery butter	32,925,707	pounds
Ice-cream	3,598,466	gallons
Cheese	8,264,332	pounds
Evaporated and condensed milk	54,545,568	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,000.00	

XVIII

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403	pounds
Creamery butter	29,804,070	pounds
Ice-cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85	

XIX

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

XX

That the real estate taxes paid by the farmers of the state of Washington on properties used to raise forage and feed for their cows are $8,486,482, and on personal property $2,402,272.

[fol. 91] XXI

That the complainant, after March 9, 1931, could not have sold any oleomargarine in the state of Washington except at a loss, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter. There is no proof that the tax does not give a reasonable profit on cost of manufacture or on capital invested. (See 2 Fed. Sup. 417 at 422.)

And from the foregoing Findings of Fact the court makes the following

Conclusions of Law

I

That the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, either (a) in that it levies a tax confiscatory in amount and has destroyed complainant's business, or (b) in that it is a tax for a private purpose.

II

The said enactment of the State of Washington does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, either (a) in that it actually suppresses and destroys a legitimate business by means of a law not applicable to or equally operative upon other legitimate businesses, or (b) in that it imposes a tax in aid of a private industry.

III

The said enactment of the State of Washington does not violate the commerce clause of the Federal Constitution.

[fol. 92] IV

The said enactment of the State of Washington does not constitute unlawful interference with the federal taxing power.

Wherefore, defendants are entitled to a final decree dismissing the above entitled cause.

Complainant severally excepts to Conclusions of Law numbered I, II, III and IV, upon the ground that each of said conclusions is contrary to law and unwarranted by the Findings of Fact, and each of said exceptions to said conclusions is by the court hereby allowed.

Done by the court this 28th day of August, 1933.

Curtis D. Wilbur, Circuit Judge; Jeremiah Neterer, District Judge. (Judge Cushman is on vacation, out of the district and difficult to reach.)

Approved as to form:

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys and Solicitors for Defendant. Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant.

[File endorsement omitted.]

[fol. 93] In United States District Court for the Western District of Washington, Southern Division

In Equity. No. 458

A. Magnano Company, a Corporation, Complainant,

vs.

G. W. Hamilton, as Attorney General of the State of Washington, Walter J. Robinson, as Director of Agriculture of the State of Washington, and Clarence D. Martin, as Governor of the State of Washington, Defendants

Final Decree—Filed Aug. 29, 1933

The above-entitled cause came on for final hearing on September 13, 1932, before this court, consisting of three

judges, pursuant to Section 266 of the Judicial Code of the United States, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed by this court as follows:

That the above-entitled cause be dismissed and that the defendants recover of the complainant their costs and disbursements herein.

Complainant's exception to the foregoing decree is hereby allowed.

Done by the court this 28th day of August, 1933.

Curtis D. Wilbur, Circuit Judge; Jeremiah Neterer, Dist. Judge.

Approved as to form:

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants. Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Oct. 21, 1933

To the Honorable Judges of the District Court of the United States for the Western District of Washington:

A. Magnano Company, a corporation, your petitioner, respectfully shows:

I

Your petitioner is the complainant in the above entitled cause.

II

On the 18th day of September, 1931, your petitioner filed an amended bill of complaint in the District Court of the United States for the Western District of Washington, asking for an interlocutory and permanent injunction against the predecessors in office of the defendants to restrain them from enforcing, as against the petitioner, Chapter 23 of the Laws of 1931 of the State of Washington, upon the ground that the said statutes of the State of Washington are violative of the Constitution of the United States. A copy of the said statutes of the State of Washington was attached to the said amended bill of complaint as Exhibit "A". The grounds upon which the said statutes [fol. 95] are claimed to be invalid by this petitioner are more particularly set forth in paragraph XVIII of said amended bill of complaint.

III

At the time of the filing of the amended bill of complaint your petitioner renewed its application for an interlocutory injunction, and thereupon, pursuant to Section 266 of the Judicial Code of the United States, the said application came on for hearing before a statutory court of three judges, to-wit, the Honorable Curtis D. Wilbur, Circuit Judge for the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington, duly convened in accordance with the provisions of said section. At the time of the hearing upon complainant's application for an interlocutory injunction, the defendants appeared in the above-entitled court and filed an answer containing a motion to dismiss the said amended bill of complaint, upon the ground that the said amended bill of complaint did not state facts sufficient to constitute a cause of action. The said three-judge court, after hearing complainant's application for an interlocutory injunction and the said motion to dismiss, denied the defendants' motion to dismiss and also denied the complainant's application for an interlocutory injunction, and determined that the whole matter should be disposed of at final hearing on the merits. The opinion of the statutory court is reported in 2 Fed. Supp. 414.

IV

Thereafter, to-wit, on the 17th day of September, 1932, the above entitled cause came on for final hearing, before this court, consisting of said three judges, pursuant to Sec- [fol. 96] tion 266 of the Judicial Code of the United States, upon a stipulation of facts agreed to by the parties, supplemented by brief oral testimony. At the conclusion of said final hearing the said statutory court took the said cause under advisement, and on or about the 17th day of January, 1933, rendered its opinion, to the effect that the above entitled cause should be dismissed. The opinion is reported in 2 Fed. Supp. 417. Thereafter, owing to a change in the incumbency in office of the defendants, and upon appropriate showing and written consent of their successors, their said successors above named were, by appropriate order, substituted as parties defendant. Thereafter, to-wit, on the 28th day of August, 1933, the above-entitled court, pursuant to Equity Rule 70½, entered herein its findings of fact and conclusions of law and its final decree, dismissing the above entitled cause and granting the defendants their costs and disbursements herein.

V

The final decree is greatly to the prejudice and injury of your petitioner and is erroneous and inequitable.

VI

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith, pursuant to Rule 9 of the Rules of the United States Supreme Court; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays for the allowance of [fol. 97] an appeal in said cause to the Supreme Court of the United States, agreeably to the statutes and rules of the court in such cases made and provided, and that a

proper order touching the security required of the petitioner be made.

Dated: October 21, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for the Petitioner. 660 Colman Building, Seattle, Washington.

[File endorsement omitted.]

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed Oct. 21, 1933

The appellant assigns the following errors in the record and proceedings in this case:

I

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it levies a tax confiscatory in amount and has destroyed complainant's business.

II

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in [fol. 99] that under the due process clause of the Fourteenth Amendment taxes may be levied only for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into, and sale within the State of Washington of

oleomargarine in aid of the dairy industry, a purely private business.

III

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that said enactment of the State of Washington violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, either (a) in that it actually suppresses and destroys a legitimate business by means of a law not applicable to or equally operative upon other legitimate businesses, or (b) in that it imposes a tax in aid of a private industry.

IV

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of Washington violates the commerce clause of the Constitution of the United States (Paragraph 3 of Section 8 of Article I), in that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state.

V

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of [fols. 100–119] Washington constitutes an unconstitutional interference with the taxing power of the Government of the United States granted by Article I, Section 8, of the Constitution of the United States, in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises, and has, without producing any revenue whatsoever for the State of Washington, completely destroyed, as found in the Findings of Fact, all federal revenue from the sale of oleomargarine within the State of Washington, under applicable acts of Congress.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said decree of the Dis-

trict Court of the United States for the Western District of Washington dated August 28, 1933, in the above entitled cause, be reversed and a decree rendered in favor of this complainant.

Dated this 21st day of October, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant and Appellant, 660 Colman Building, Seattle, Washington.

[File endorsement omitted.]

[fol. 120] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed Oct. 21, 1933

The petition of A. Magnano Company, a corporation, the complainant in the above-entitled action, for an appeal in the above-entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the Western District of Washington, having been presented herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the record in this cause having been considered;

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Western District of Washington made and entered in this cause on the 28th day of August, 1933, and that the Clerk of the said District Court of the United States for the Western District of Washington, Southern Division, shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the court, a true copy of the material parts [fol. 121] of the record herein, which shall be designated by a præcipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of two hundred fifty and no/100 Dollars ($250.00), conditioned as required by law.

Done at Tacoma this 21st day of October, 1933.

Edward E. Cushman, District Judge.

[File endorsement omitted.]

[fols. 122–125] Bond on appeal for $250.00, approved and filed Oct. 21, 1933, omitted in printing.

[fol. 126] [File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

PROOF OF SERVICE OF PAPERS UNDER RULE 12, UNITED STATES SUPREME COURT RULES—Filed Oct. 25, 1933

Service, pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States, is hereby acknowledged of copies of the following papers in the above entitled cause:

1. Petition for Appeal.
2. Order Allowing Appeal.
3. Assignment of Errors.
4. Statement as to Jurisdiction.

Dated this 25th day of October, 1933.

G. W. Hamilton, Attorney General of the State of Washington; E. P. Donnelly, Assistant Attorney General, Attorneys for Appellees. Address: Temple of Justice, Olympia, Washington.

[fol. 127] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION FOR TRANSCRIPT ON APPEAL—Filed Oct. 25, 1933

It is hereby stipulated by the parties hereto, by their respective attorneys and solicitors undersigned, that the clerk of the above-entitled court shall prepare a transcript of the record on appeal of the above entitled cause to the

Supreme Court of the United States, which shall constitute the transcript of record on said appeal, including therein the following papers and documents:

1. Amended bill of complaint.
2. Application for interlocutory injunction and convening of statutory three-judge court, based upon verified amended bill of complaint.
3. Notice to defendants of application for interlocutory injunction.
4. Defendants' answer to amended bill of complaint.
5. Order convening statutory three-judge court.
6. Notice to defendants of order convening statutory three-judge court.
7. Opinion of three-judge court on motion to dismiss and on application for interlocutory injunction.
8. Stipulation of facts.
9. Statement of the evidence.

[fol. 128] 10. Opinion of three-judge court on the merits after final hearing.

11. Findings of fact and conclusions of law.
12. Final decree.
13. Petition for appeal to the Supreme Court of the United States.
14. Assignment of errors.
15. Statement as to jurisdiction of the Supreme Court of the United States.
16. Order allowing appeal.
17. Cost bond.
18. Citation.
19. Statement directing attention to Rule 12, United States Supreme Court Rules.
20. Proof of service of papers required by Rule 12, United States Supreme Court Rules.
21. Stipulation for transcript on appeal.
22. Clerk's certificate.

Dated: October 25th, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys and Solicitors for Complainant and Appellant. G. W. Hamilton, Attorney General of the State of Washington; E. P. Donnelly, Assistant Attorney General, Attorneys and Solicitors for Defendants and Appellees.

[File endorsement omitted.]

[fol. 129] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 130 & 131] Citation in usual form, showing service on G. W. Hamilton, filed Oct. 25, 1933, omitted in printing.

[fol. 132] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—(PURSUANT TO RULE 13 (9))—Filed Nov. 17, 1933

[fol. 133] Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Seattle, Washington, November 14, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Solicitors for Appellant.

[fol. 134] [File endorsement omitted.]

Endorsed on cover: File No. 38,192. W. Washington, D. C. U. S. Term No. 589. A. Magnano Company, appellant, vs. G. W. Hamilton, as Attorney General of the State of Washington, et al., etc. Filed November 15, 1933. File No. 589 O. T. 1933.

(4479-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 589

A. MAGNANO COMPANY, APPELLANT,

vs.

G. W. HAMILTON, AS ATTORNEY GENERAL OF THE STATE OF WASHINGTON, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial Code, § 266 (28 U. S. Code, § 380), reading, to the extent relevant here, as follows:

> "* * * The requirement respecting the presence of three judges shall also apply to the final hearing in

such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

The Statute of the State the Validity of Which is Involved.

The validity of Chapter 23 of the Laws of 1931 of the State of Washington, imposing a tax of fifteen cents per pound on butter substitutes, is involved. The pertinent provisions thereof are as follows:

"CHAPTER 23

"(Laws of 1931)

"An Act relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately.

"Section 1. (*a*) The term 'butter substitute' whenever used in this act shall be held and construed to mean and include any compound or compounds of animal or vegetable fats, such as tallow, beef fat, suet, lard, lard oil, suine, lardine, intestinal fat, offal fat, cocoanut oil, olive oil, cottonseed oil, peanut oil, in combination with milk, butter or any product of milk or butter, either colored or uncolored, that does not contain eighty per cent (80%) of milk or butter fat, and is sold or used as a substitute for butter.

"(*b*) The term 'distributor' whenever used in this act shall be held and construed to mean and include any person, firm or corporation which produces, refines, manufactures or compounds and thereafter sells such butter substitute in the state of Washington for use and sale in this state, or who imports and sells such butter substitute into this state, except as hereinafter provided.

"Sec. 2. That in addition to the taxes now provided for by law each and every distributor, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of representatives or agents in this state, in the sale of butter substitutes as herein defined, shall not later than the fifteenth day of each calendar month render a sworn statement to the director of agriculture of the state of Washington of all such butter substitute sold by him or them in the state of Washington during the preceding calendar month, and pay an excise tax of fifteen cents per pound on all butter substitutes so sold as shown by such statement in the manner and within the time hereinafter provided.

* * * * * * *

"Sec. 4. Every distributor of such butter substitute shall render to the director of agriculture of the state of Washington, on or before the fifteenth day of such month, on form prescribed, prepared and furnished by said director, a sworn statement of the number of pounds of butter substitute sold by it, him or them during the preceding calendar month, which statement shall be sworn to by one of the principal officers in case of a domestic corporation, or by the resident general manager or attorney-in-fact in case of a foreign corporation, or by the managing agent, or owner in case of a firm or association, and shall contain a statement of the quantities in pounds of butter substitute sold. Bills shall be rendered to dealers in butter substitutes as herein defined. Said bills shall contain a statement printed thereon in a conspicuous place that the distributor of such butter substitute has assumed the liability to the state for the license tax therein imposed and that he, it or they will pay said license tax on or before the fifteenth day of the following month.

* * * * * * *

"Sec. 8. It shall be unlawful for any person, firm or corporation dealing in butter substitute to receive or accept any delivery or shipment of butter substitute from any distributor or to pay for the same, or to sell or offer the same for sale, unless the statement provided for in section seven (7) appears upon the container and upon all invoices for such butter substitute. If any shipment of butter substitute is received by any person, firm or corporation from any distributor, or is sold or offered for sale by him or them, upon which the requirements of sections 4 and 7 of this act are not complied with, such person, firm or corporation shall be deemed guilty of a misdemeanor: Provided, That the provisions of this section shall not apply to the receipt or sale of butter substitutes which are exempt from state tax under the constitution and laws of the United States.

"Sec. 9. The director of agriculture shall have the power and it shall be his duty from time to time, to adopt, publish and enforce rules and regulations not inconsistent herewith for the purpose of carrying out the provisions of this act.

. . . . . .

"Sec. 12. Any distributor, association of persons, firm or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

. . . . . .

(The Act is set forth in full in the opinion on the merits of the above entitled cause, reported in 2 Fed. Supp. 417.)

C.

The date of the final decree of the District Court of the United States for the Western District of Washington sought to be reviewed is August 28, 1933.

The date on which the application for appeal was presented is October 21, 1933.

D.

The Nature of the Case and the Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

The appellant, A. Magnano Company, a corporation, commenced this suit in the District Court of the United States for the Western District of Washington, Southern Division, to enjoin the appellees and their predecessors in office from collecting of the appellant a tax of fifteen cents per pound upon each pound of alleged butter substitute sold by appellant, under Chapter 23 of the Laws of 1931 of the State of Washington, and to restrain any attempt by the said appellees, and their predecessors in office, to enforce the said statute and its penalties against the appellant.

On September 18, 1931, the appellant filed its amended bill of complaint in the above entitled cause, asserting the invalidity of Chapter 23 of the Laws of 1931 of the State of Washington under several clauses of the Federal Constitution, and praying that the defendants be temporarily and permanently enjoined from enforcing the Act as against this complainant. The said Act of the State of Washington was claimed, in the amended bill of complaint, to be invalid on the following grounds:

(*a*) For the reason that the said Act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process of law, and does and will deny to it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States;

(b) For the further reason that, in violation of the above mentioned Article XIV of the Amendments to the

Constitution of the United States, said Act deprives hundreds of prospective customers of complainant of their liberty in freely purchasing or entering into contracts to purchase said food product for their own consumption;

(*c*) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of oleomargarine in aid of the dairy industry, a private business;

(*d*) For the further reason that said Act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States;

(*e*) For the further reason that said Act violates Article I, Section 8, of the Constitution of the United States in that said Act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises.

The jurisdictional facts alleged in its amended bill of complaint are found by the three-judge court to be true in their entirety in its findings of fact, hereinafter set forth in detail in this statement as to jurisdiction, and therefore, in the interest of brevity, are not duplicated at this point.

Simultaneously with the filing of its said amended bill of complaint the appellant made its application for an interlocutory injunction, pursuant to Section 266 of the Judicial Code of the United States. The said application for an interlocutory injunction was heard before three judges, as required by said section of the Judicial Code, to wit, the Honorable Curtis D. Wilbur, Circuit Judge for-

the Ninth Circuit, the Honorable Edward E. Cushman, District Judge for the Western District of Washington, and the Honorable Jeremiah Neterer, District Judge for the Western District of Washington.

At the time of said hearing the defendants in said cause filed an answer, which included a motion to dismiss. The said three-judge court, on February 26, 1932, rendered its opinion denying complainant's application for an interlocutory injunction, but also denying the motion to dismiss interposed by the said defendants. The opinion of the three-judge court upon the interlocutory injunction and the motion to dismiss is reported in 2 Fed. Supp. 414.

Thereafter this complainant and appellant and the said defendants entered into a written stipulation of facts, and agreed that the said cause should be heard upon the merits upon said written stipulation of facts and such additional testimony as either of the parties desired to offer.

On September 13, 1932, the said cause came on for final hearing before the said three-judge court, pursuant to Section 266 of the Judicial Code, consisting of the same three judges who had heard the application for an interlocutory injunction. The said final hearing was had upon the said written stipulation of facts and very brief testimony extending not over fifteen or twenty minutes.

The three-judge court took the said cause under advisement, and on the 17th day of January, 1933, filed its opinion denying appellant's application for a permanent injunction against the statute complained of, and holding that the said suit should be dismissed. The opinion is reported in 2 Fed. Supp. 417.

Thereafter, owing to a change in the incumbency in office of the defendants, and upon appropriate showing and written consent of their successors, their said successors above named were, by appropriate order, substituted as parties defendant.

Thereafter, on the 28th day of August, 1933, the said three-judge court made its written findings of fact and conclusions of law, all as required by Equity Rule No. 70½, in which findings of fact the said three-judge court incorporated the entire stipulation of facts previously entered into by the parties, and several other matters adverted to in the brief oral testimony.

The said findings of fact and conclusions of law made by the said three-judge court on August 28, 1933, are as follows:

Findings of Fact.

I.

Complainant is a corporation duly organized and existing under and by virtue of the laws of the State of Washington and a resident and citizen of such state and has paid its annual license fee last due the State of Washington.

II.

Defendant G. W. Hamilton is the duly elected, qualified and acting attorney general of the State of Washington and a resident and citizen of said state and of the western district of Washington; defendant Walter J. Robinson is the duly appointed, qualified and acting director of agriculture of the State of Washington and a resident and citizen of said state and of the western district of Washington; and defendant Clarence D. Martin is the duly elected, qualified and acting governor of the State of Washington and a resident and citizen of said state and of the western district of Washington.

III.

That this is a cause of a civil nature in equity and that the matters in controversy arise under the Constitution

and laws of the United States and that the amount in controversy exceeds the sum of $3,000, exclusive of interest and costs.

IV.

That the legislature of the State of Washington at its 1931 session regularly and duly enacted Chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

V.

That complainant for many years immediately prior and up to the enactment of said Chapter 23, Laws of 1931, was engaged in importing into the State of Washington from factories located in the State of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the State of Washington, an article of trade and commerce known as "Nucoa."

VI.

That said Nucoa is classified by the Government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said Government and over said entire period oleomargarine continuously has been and now is recognized by said Government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

VII.

That all things have at all times been, and are, done necessary to make said Nucoa comply with all Federal laws and regulations and all laws and regulations of the State of Washington relating to pure foods and the manu-

facture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other Federal laws and regulations, and all laws and regulations of the State of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been added, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times have been and are of good quality, and all oils and fats at all times have been and are refined at high temperature so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product *sui generis*.

VIII.

That, pursuant to Federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word "Oleomargarine"; that each individual one-pound print contained in said original package is packed in a

carton which has printed or branded on the two principal panels thereof the word "Oleomargarine" in plain, Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the State of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

IX.

That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product *sui generis;* and that since the passage of the said Act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product *sui generis.*

X.

That for many years last past and continuously up to the effective date of said Act, the average annual sales of oleomargarine in the State of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the State of Washington, and approximately 3,700,000

pounds were shipped into the State of Washington from other states in the United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the State of Washington for many years last past and up to March 9, 1931, has had the characteristics and been sold under the conditions described in paragraphs VII, VIII, and IX of these findings of fact. That said oleomargarine of complainant and all other oleomargarine sold in the State of Washington at all times up to the passage of said Act was sold in direct competition with dairy butter produced in the State of Washington; that thousands of persons of moderate means in the State of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production of dairy butter in the State of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to September 13, 1932, the production of butter in the State of Washington has been at approximately the same rate per annum; that at the time of the passage of said Act the wholesale price of oleomargarine in the State of Washington was twenty cents a pound and the wholesale price of dairy butter in the State of Washington was thirty-two cents a pound; that at the time of the passage of said Act the retail price of said oleomargarine in the State of Washington was twenty-five cents a pound, and the retail price of butter in the State of Washington was from thirty-five to thirty-seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the State of Washington were approximately the same as they were at the time of the passage of said Act, and were approximately the same throughout the entire period since the passage of the Act and up to the filing of the amended bill;

that on the 13th day of September, 1932, the wholesale price of butter in the State of Washington was twenty-two cents a pound; and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant on the 13th day of September, 1932, was twelve cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the State of Washington at fourteen cents a pound, and said retail dealers in the State of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and September 13, 1932, there was a gradual and continuous decline of both said butter and oleomargarine prices down to said September 13, 1932, in the same general proportion as that above set forth.

XI.

That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within the State of Washington of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the State of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the State of California and sold in the State of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged

two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of oleomargarine by the complainant in the State of Washington was as follows:

Year.	Pounds sold.
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the State of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said Act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the State of Washington for use and sale in the State of Washington, or imported into or sold in the State of Washington any such oleomargarine.

XII.

That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the State of Washington under the provisions of said Act for the reason that, since said date, no sales of oleomargarine subject to tax under said Act have been made; that since the effective date of said Act no applications have been made to the collector of internal revenue of the United States in the State of Washington for wholesale or retail licenses under the Federal statutes to sell oleomargarine in the State of Washington, nor have any such wholesale or retail deal-

ers' licenses been issued to dealers in the State of Washington under said Federal statutes since such date, nor has the Government of the United States derived any revenue from sales of oleomargarine within the State of Washington since such date.

XIII.

That for a long time prior to and up to the time said Act imposing a tax of fifteen cents per pound became effective, complainant imported into the State of Washington said Nucoa at a cost of seventeen cents per pound, and sold said product to retail dealers in the State of Washington at twenty cents per pound, who, in turn, sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said Act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said Act, could sell the same to retail dealers, and the price per pound at which retail dealers in the State of Washington could resell to the general public has remained the same, and that since the date of filing the amended bill down to September 13, 1932, there was a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacture, importing and/or selling oleomargarine within the State of Washington.

XIV.

That defendants and their respective predecessors in office have at all times since the effective date of Chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine

sold by them within the State of Washington. That the defendants state that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XV.

That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and join in the expense of this proceeding. That the complainant has no adequate remedy at law.

XVI.

That dairying is one of the basic industries of the State of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

XVII.

That according to the official report of the State Department of Agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000 pounds
Creamery butter	32,925,707 pounds
Ice cream	3,598,466 gallons
Cheese	8,264,332 pounds
Evaporated and condensed milk	54,545,568 pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,000

XVIII.

That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403	pounds
Creamery butter	29,804,070	pounds
Ice cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85	

XIX.

That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

XX.

That the real estate taxes paid by the farmers of the State of Washington on properties used to raise forage and feed for their cows are $8,436,482, and on personal property $2,402,272.

XXI.

That the complainant, after March 9, 1931, could not have sold any oleomargarine in the State of Washington except at a loss, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter. There is no proof that the tax does not give a reasonable profit on cost of

manufacture or on capital invested. (See 2 Fed. Sup. 417 at 422.)

From the foregoing findings of fact the court made the following

Conclusions of Law.

That the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, either (*a*) in that it levies a tax confiscatory in amount and has destroyed complainant's business, or (*b*) in that it is a tax for a private purpose.

II.

The said enactment of the State of Washington does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, either (*a*) in that it actually suppresses and destroys a legitimate business by means of a law not applicable to or equally operative upon other legitimate businesses, or (*b*) in that it imposes a tax in aid of a private industry.

III.

The said enactment of the State of Washington does not violate the commerce clause of the Federal Constitution.

IV.

That said enactment of the State of Washington does not constitute an unlawful interference with the Federal taxing power.

Complainant severally excepted to Conclusions of Law numbered I, II, III and IV, upon the ground that each of said conclusions is contrary to law and unwarranted by the

Findings of Fact, and each of the exceptions to the Conclusions of Law were allowed by the court.

On the basis of the foregoing Findings of Fact and Conclusions of Law, and on the same day, to-wit, August 28, 1933, the said three-judge court entered its final decree denying appellant's application for a permanent injunction and dismissing the action.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this Court:

Herkness v. *Irion*, 278 U. S. 92;
Keokuk Bridge Co. v. *Salm*, 258 U. S. 122, 124;
Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245;
Clark v. *Poor*, 274 U. S. 554;
Stratton v. *St. Louis, etc. R. Co.*, 282 U. S. 10;
In re Buder, 271 U. S. 461;
Stephenson v. *Binford*, 287 U. S. 251;
Sterling v. *Constantin*, 287 U. S. 378;
Field Packing Co. v. *Tax Commission of Kentucky* (Three-judge Federal Court, Ky., April 20, 1933, holding claim as to invalidity of Kentucky ten cent per pound tax on oleomargarine substantial under 14th Amendment; not yet reported, but now on appeal to this Court), No. 541, October Term, 1933, argued Nov. 15, 1933;
Jelke Co. v. *Emery* (*Wis.*), 214 N. W. 369;
Darnell v. *Memphis*, 208 U. S. 113, 122;
Gramling v. *Maxwell*, 52 F. (2d) 256, 258;
Walling v. *Michigan*, 116 U. S. 446, 457, 458;
Minnesota v. *Barber*, 136 U. S. 313, 326;

Adams v. *Tanner*, 244 U. S. 590;
Weaver v. *Palmer Bros.*, 270 U. S. 402;
In re Quong Woo, 13 Fed. 229, 233;
Ex parte Crowder, 171 Fed. 250, 252;
McCallen v. *Massachusetts*, 279 U. S. 620, 626, 627;
Schollenberger v. *Pennsylvania*, 171 U. S. 1, 7-19;
Collins v. *New Hampshire*, 171 U. S. 30, 33;
Casey v. *United States*, 276 U. S. 413, 420;
Nigro v. *United States*, 276 U. S. 332, 353;
Mountain Timber Co. v. *Washington*, 243 U. S. 219, 237;
American Mfg. Co. v. *St. Louis*, 250 U. S. 459, 462;
South Carolina v. *United States*, 199 U. S. 437, 454;
Van Brocklin v. *Tennessee*, 117 U. S. 151, 155.

We respectfully submit that the Supreme Court of the United States have jurisdiction of this appeal by virtue of Section 266 of the Judicial Code (28 U. S. Code §380).

Respectfully submitted,

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Attorneys and Solicitors for Appellant.

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No. 589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

A. MAGNANO COMPANY, a corporation,
Appellant,

vs.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANT

OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Counsel for Appellant.

McMICKEN, RAMSEY, RUPP & SCHWEPPE,
A. M. DAVIS,
W. R. BROWN,
Of Counsel for Appellant.

THE ARGUS PRESS • SEATTLE

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OPINION BELOW. *A. Magnano Company v. Dunbar et al.*, reported in 2 Fed. Supp. 417 (R. 41).

JURISDICTIONAL AUTHORITY. An appeal granted October 21, 1933, pursuant to Section 266, Judicial Code, (28 U. S. Code, §380) (R. 70).

STATUTE OF WASHINGTON INVOLVED. Act approved March 9, 1931, Acts of 1931, Chapter 23, page 77.

DATE OF DECREE. August 28, 1933 (R. 64). Petition for Appeal, Assignments of Error and Order Allowing Appeal, October 21, 1933 (R. 65, 68, 70).

NATURE OF THE CASE.

A. Magnano Company, a corporation, sought to enjoin the Attorney General, the Director of Agriculture and the Governor of the State of Washington from enforcing an act passed in 1931 imposing an excise tax of fifteen cents per pound on all oleomargarine sold in the State of Washington, upon the following grounds:

(a) That such tax operated to prohibit and destroy a useful and legitimate business and hence was void under the due process clause of the Fourteenth Amendment.

(b) That the sole purpose of the imposition of the tax was to burden and prohibit the manufacture within and importation into and sale within the State of Washington of oleomargarine, in aid of the dairy industry, a purely private industry, and hence was void in that under the Fourteenth Amendment taxes may only be levied for public purposes.

(c) That such tax imposes an unjust and discriminatory burden upon the appellant in so far as it is engaged in interstate commerce in the purchase and shipment of oleomargarine from without the State of Washington into the State of Washington for the purpose of sale in said state, and hence is void under paragraph 3 of Section 8 of Article I of the Constitution of the United States.

(d) That the imposition of said tax interferes with the power of Congress to levy and collect taxes, duties, imposts and excises, and hence is void under Section 8 of Article I of the Constitution of the United States.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

A. MAGNANO COMPANY, a corporation,
Appellant,

vs.

G. W. HAMILTON, as Attorney General of the State of Washington, WALTER J. ROBINSON, as Director of Agriculture of the State of Washington, and CLARENCE D. MARTIN, as Governor of the State of Washington,
Appellees.

No. 589

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellant, A. Magnano Company, is a Washington corporation, which from 1919 to the passage in 1931 of the act here under attack did a large business in the importation into and sale within the State of Washington of an oleomargarine called "Nucoa," its sales of that product throughout that period being not less than 2,000,000 pounds a year and its annual net profits derived from that business being in excess of $20,000 per year (R. 60).

The parties to this litigation stipulated and the court below found that Nucoa has never been sold as butter, that no deception or misrepresentation has

ever been practiced or used in its sale, that its color has always been white, and that it was "a pure, healthful and nutritious article of food with a well established place in the dietary" (R. 57, 58).

Nevertheless, the legislature in February, 1931, passed, and the governor on March 9, 1931, approved, a statute imposing a tax of fifteen cents per pound on all oleomargarine sold within the state (The full text of the statute is printed in the Appendix to this brief; also in the Record, pp. 10-14, and also in 2 Fed. Supp. 417). The act contained a provision (Sec. 15) which declared that an emergency existed because the revenues of the state were insufficient to support the state government and the act would furnish additional and necessary requisite revenues (R 14). The act, therefore, became immediately operative.

Five months after the act became effective the appellant brought this suit in the District Court of the United States for the Western District of Washington, Southern Division, to enjoin the collection of the tax from the appellant and to restrain the enforcement of the statute and its penalties against the appellant.

On September 18, 1931, an amended bill of complaint was filed (R. 10), in which it was alleged that the statute was void as to the appellant for the following reasons:

(a) For the reason that the said act violates the Constitution of the United States and the amendments thereto, in that the threatened enforcement thereof does and will deprive the complainant of its property without due process of law, and does and will deny to

it the equal protection of the laws, in violation of Article XIV of the Amendments to the Constitution of the United States.

(b) For the further reason that taxes under the Fourteenth Amendment may only be levied for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into and sale within the State of Washington of oleomargarine in aid of the dairy industry, a private business.

(c) For the further reason that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state, all in violation of paragraph 3 of Section 8 of Article I of the Constitution of the United States.

(d) For the further reason that said act violates Article I, Section 8, of the Constitution of the United States, in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises (R. 8[illegible]).

Simultaneously with the filing of the amended bill, appellant made application for an interlocutory injunction, and said application was heard before three judges, as required by Section 266 of the Judicial Code. At the time of the hearing the defendants in said cause filed an answer, which included a motion to dismiss. The three-judge court on February 26, 1932, rendered its opinion denying appellant's application for an interlocutory injunction, but also denying the

motion to dismiss interposed by the said defendants (See, 2 Fed. Supp. 414) (R. 28).

Subsequent to the rendition of the opinion just referred to, this appellant and the defendants entered into a written stipulation of facts, and agreed that the cause should be heard upon the merits upon said written stipulation and such additional testimony as either of the parties desired to offer.

On September 13, 1932, the case came on for final hearing before a three-judge court consisting of the same judges who had heard the application for an interlocutory injunction. The said final hearing was had upon the said written stipulation of facts and testimony so brief that not more than fifteen or twenty minutes was consumed in its taking.

On January 17, 1933, the three-judge court filed its opinion denying the appellant's application for a permanent injunction against the enforcement of the statute complained of and holding that the suit should be dismissed (2 Fed. Supp. 417; R. 41).

Thereafter, owing to a change in the incumbency in office of the defendants, and upon appropriate showing and written consent of their successors, their said successors above named were, by appropriate order, substituted as parties defendant.

Some time later the said three-judge court made its written findings of fact and conclusions of law, all as required by Equity Rule No. 70½, in which findings of fact the said three-judge court incorporated the entire stipulation of facts previously entered into by the parties, and added thereto two additional findings, namely XX and XXI. Parenthetically we may say

that paragraph XX relates to the amount of real estate and personal property taxes paid by the dairy farmers in the state, while paragraph XXI recites *interalia* that *the appellant could not, after the passage of the act, sell any oleomargarine in the State of Washington except at a loss, because the tax of fifteen cents a pound added to what it paid for the product would make the price of oleomargarine higher than that of butter.*

The stipulation of facts and the findings of fact are found in the record at pp. 29-36, and pp. 55-63 respectively, but for the convenience of the court the findings are here set forth:

Findings of Fact

I

"Complainant is a corporation duly organized and existing under and by virtue of the laws of the state of Washington and a resident and citizen of such state and has paid its annual license fee last due the state of Washington.

II

"Defendant G. W. Hamilton is the duly elected, qualified and acting attorney general of the state of Washington and a resident and citizen of said state and of the western district of Washington; defendant Walter J. Robinson is the duly appointed, qualified and acting director of agriculture of the state of Washington and a resident and citizen of said state and of the western district of Washington; and defendant Clarence D. Martin is the duly elected, qualified

and acting governor of the state of Washington and a resident and citizen of said state and of the western district of Washington.

III

"That this is a cause of a civil nature in equity and that the matters in controversy arise under the constitution and laws of the United States and that the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs.

IV

"That the legislature of the state of Washington at its 1931 session regularly and duly enacted Chapter 23, Laws of 1931, providing for the taxation of sales of butter substitute within the state at the rate of 15 cents per pound.

V

"That complainant for many years immediately prior and up to the enactment of said Chapter 23, Laws of 1931, was engaged in importing into the state of Washington from factories located in the state of California, and thereafter selling to bakeries, confectioners, grocers, institutions and other persons in the state of Washington, an article of trade and commerce known as 'Nucoa.'

VI

"That said Nucoa is classified by the government of the United States as oleomargarine; that the manufacture and sale of oleomargarine for more than thirty years continuously has been regulated by said government and over said

entire period oleomargarine continuously has been and now is recognized by said government as a legitimate, wholesome and healthful article of commerce, and that oleomargarine has been in general use by that name throughout the United States for more than thirty years last past.

VII

"That all things have at all times been, and are, done necessary to make said Nucoa comply with all federal laws and regulations and all laws and regulations of the state of Washington relating to pure foods and the manufacture and sale thereof; and that all things have at all times been, and are, done necessary to make said product comply with all other federal laws and regulations, and all laws and regulations of the state of Washington in any way regulating said article or the persons, firms and corporations engaged in the manufacture, importation and sale of the same. That said product has been continuously on the market for many years, and that it at all times has been and is a pure, wholesome and nutritious food product made from animal and/or vegetable oils or fats emulsified with milk or milk products, to which salt has been addded, and not containing eighty per cent of milk or butter fat; that said Nucoa is now and for many years has been used for cooking, baking, frying and general culinary and household purposes. That all of the materials used in the manufacture of said oleomargarine at all times

have been and are of good quality, and all oils and fats at all times have been and are refined at high temperature so as to insure their purity. That all milk used in the manufacture of said product at all times has been and is heated to a high temperature so as to insure purity before emulsification. That the color of the finished product sold and dealt in by the complainant at all times has been and is white and uncolored. That the resultant product at all times has been and is a pure, nutritious and healthful article of food with a well established place in the dietary. That said product at all times has been and is a wholly original and independent product *sui generis*.

VIII

"That, pursuant to federal laws and regulations, each original twelve-pound package of said product has printed or branded thereon in letters three-fourths of an inch high the word 'OLEOMARGARINE;' that each individual one-pound print contained in said original package is packed in a carton which has printed or branded on the two principal panels thereof the word 'OLEOMARGARINE' in plain, Gothic letters of not less than twenty-point type, which letters are printed in a conspicuous color that forms a strong contrast with the color of said carton; that no device or words are used thereon calculated to mislead the public into believing that the said product is anything other than oleomargarine; that all purchasers of said product are at all

times advised as to the exact nature of the product purchased, viz., that it is oleomargarine; that no deception or misrepresentation is practiced or used in the sale thereof; and that complainant has not sold, and does not intend to sell, said product in the state of Washington except as thus plainly marked and branded and except in accordance with the practice above outlined.

IX

"That at all times prior to the passage of said Chapter 23 of the Laws of Washington of 1931 said oleomargarine so sold by complainant was not sold and advertised as or for butter, but was sold as a wholly original and independent product *sui generis;* and that since the passage of the said act complainant has not had, and does not have, any intention of advertising or selling said oleomargarine as or for butter, but intends to advertise and sell such oleomargarine only as a wholly original and independent product *sui generis.*

X

"That for many years last past and continuously up to the effective date of said act, the average annual sales of oleomargarine in the state of Washington have exceeded 5,000,000 pounds. That of said 5,000,000 pounds approximately 1,300,000 pounds were manufactured within the state of Washington, and approximately 3,700,000 pounds were shipped into the state of Washington from other states in the

United States of America. That all oleomargarine that has been sold by any person, firms and corporations whomsoever in the state of Washington for many years last past and up to March 9, 1931, has had the characteristics and been sold under the conditions described in paragraphs VII, VIII and IX of these findings of fact. That said oleomargarine of complainant and all other oleomargarine sold in the state of Washington at all times up to the passage of said act was sold in direct competition with dairy butter produced in the state of Washington; that thousands of persons of moderate means in the state of Washington purchased said oleomargarine in preference to butter because of the lower cost of oleomargarine; that the total production of dairy butter in the state of Washington during the year 1930 was approximately 33,000,000 pounds, and for a long time prior thereto and up to September 13, 1932, the production of butter in the state of Washington has been at approximately the same rate per annum; that at the time of the passage of said act the wholesale price of oleomargarine in the state of Washington was twenty cents a pound and the wholesale price of dairy butter in the state of Washington was thirty-two cents a pound; that at the time of the passage of said act the retail price of said oleomargarine in the state of Washington was twenty-five cents a pound, and the retail price of buttter in the state of Washington was from thirty-five to thirty-

seven cents a pound; that at the time of the filing of the amended bill the wholesale and retail prices of oleomargarine and butter in the state of Washington were approximately the same as they were at the time of the passage of said act, and were approximately the same throughout the entire period since the passage of the act and up to the filing of the amended bill; that on the 13th day of September, 1932, the wholesale price of butter in the state of Washington was twenty-two cents a pound; and the retail price twenty-four to twenty-six cents a pound; that the import price of Nucoa to complainant on the 13th day of September, 1932, was twelve cents a pound; and that complainant, if it could sell said Nucoa free of said tax, would sell to retail dealers in the state of Washington at fourteen cents a pound, and said retail dealers in the state of Washington would in turn sell said product to the general public at seventeen cents a pound. That in the interval between the filing of the amended bill and September 13, 1932, there was a gradual and continuous decline of both said butter and oleomargarine prices down to said September 13, 1932, in the same general proportion as that above set forth.

XI

"That complainant since the year 1919, and prior and up to the time of the enactment of said statute, did a large business in the importation into, and sale within, the state of Washington.

of said product; and had and still has, within the said state, a large amount of property devoted to said business; that the business of complainant in the state of Washington prior and up to the time of the enactment of said statute was a very profitable one. That complainant since the year 1919 continuously and up to March 9, 1931, had a regularly established business in which it imported from the state of California and sold in the state of Washington not less than 2,000,000 pounds of oleomargarine, viz., Nucoa, a year, and the annual net profits of said business in said state during said period exceeded the sum of $20,000.00 per year. That the gross profits of complainant on the sale of said oleomargarine in said state over said period has continuously averaged two and one-half cents per pound; and that the net profit of complainant on the sale of said oleomargarine in said state has continuously been one cent per pound. That for the years 1929 and 1930 and for the year 1931 up to March 9, 1931, said importation and sales of oleomargarine by the complainant in the state of Washington were as follows:

Year	*Pounds Sold*
1929	2,522,762
1930	2,116,056
1931 up to March 9	475,815

That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the state of California

and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the state of Washington for use and sale in the state of Washington, or imported into or sold in the state of Washington any such oleomargarine.

VII

"That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the state of Washington under the provisions of said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the state of Washington for wholesale or retail licenses under the federal statutes to sell oleomargarine in the state of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the state of Washington under said federal statutes since such date, nor has the government of the United States derived any revenue from sales of oleomargarine within the state of Washington since such date.

XIII

"That for a long time prior to and up to the time said act imposing a tax of fifteen cents per pound became effective, complainant imported into the state of Washington said Nucoa at a cost

of seventeen cents per pound, and sold said product to retail dealers in the state of Washington at twenty cents per pound, who, in turn sold said product to the general public at twenty-five cents per pound; that at all times since the effective date of said act up to the time of filing the amended bill the price per pound at which complainant could import said product and, if not taxed under said act, could sell the same to retail dealers, and the price per pound at which retail dealers in the state of Washington could resell to the general public has remained the same, and that since the date of filing the amended bill down to September 13, 1932, there was a gradual decline in said respective oleomargarine prices to the extent hereinbefore set forth. That these facts apply without substantial variations to all other persons, firms and corporations engaged in manufacturing, importing and/or selling oleomargarine within the state of Washington.

XIV

"That defendants and their respective predecessors in office have at all times since the effective date of Chapter 23, Laws of 1931, threatened and continue to threaten to enforce against complainant and all others similarly situated a tax of fifteen cents per pound on all oleomargarine sold by them within the state of Washington. That the defendants state that it is their intention to enforce said Chapter 23 of the Laws of 1931 against all sales of oleomargarine that

may be made by complainant and all others similarly situated, both by the tax provided in said enactment and the highly penal provisions thereof.

XV

"That complainant brings this suit on its own behalf and on behalf of all other persons, firms or corporations similarly situated, who may care to intervene and joint in the expense of this proceeding. That the complainant has no adequate remedy at law.

XVI

"That dairying is one of the basic industries of the state of Washington; that the state comprises 66,811 square miles of land upon which there are 40,800 dairy farms comprising in excess of 250,000 acres of improved farm land besides innumerable lesser farms devoted partially to the production of butter and other dairy products.

XVII

"That according to the official report of the state department of agriculture for the calendar year 1930, there were in the state during said year a total of 306,000 dairy cows with a production as follows:

Milk	1,794,384,000 pounds
Creamery butter	32,925,707 pounds
Ice cream	3,598,466 gallons
Cheese	8,264,332 pounds
Evaporated and condensed milk	54,545,568 pounds

Value of by-products, condensed and powdered skim milk, buttermilk and casein	$1,514,000.00

XVIII

"That the same report for the calendar year 1929 shows that there were in the state during said year a total of 290,000 dairy cows with a production as follows:

Milk	1,708,026,403	pounds
Creamery butter	29,804,070	pounds
Ice cream	5,425,523	gallons
Cheese	6,788,283	pounds
Evaporated and condensed milk	41,610,900	pounds
Value of by-products, condensed and powdered skim milk, buttermilk and casein	$3,203,086.85	

XIX

"That the report for 1930 shows that the total value of cows and farm lands and equipment necessary for their maintenance during such year was $183,600,000, not including creameries, condenseries and other similar properties.

XX

"That the real estate taxes paid by the farmers of the state of Washington on properties used to raise forage and feed for their cows are $8,436,482, and on personal property $2,402,272.

XXI

"That the complainant, after March 9, 1931, could not have sold any oleomargarine in the state of Washington except at a loss, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter. There is no proof that the tax does not give a reasonable profit on cost of manufacture or on capital invested." (See 2 Fed. Sup. 417 at 422)

SPECIFICATION OF ERRORS

The errors assigned in the record (R. 68) which appellant intends to urge and upon which it relies for reversal of the decree of the three-judge court dated Aug. 28, 1933, are:

I

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that it levies a tax confiscatory in amount and has destroyed complainant's business.

II

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the excise tax sought to be imposed by Chapter 23 of the Laws of 1931 of the

State of Washington violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that under the due process clause of the Fourteenth Amendment taxes may be levied only for public purposes, and that the sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into, and sale within the State of Washington of oleomargarine in aid of the dairy industry, a purely private business.

III

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of Washington violates the commerce clause of the Constitution of the United States (Paragraph 3 of Section 8 of Article I); in that said act imposes an unjust and discriminatory burden upon this complainant in so far as it is engaged in interstate commerce in the purchase and shipment of goods from without the State of Washington into the State of Washington for the purposes of sale in said state.

IV

The said District Court, composed of three judges, as provided by Section 266 of the Judicial Code, erred in refusing to hold that the said enactment of the State of Washington constitutes an unconstitutional interference with the taxing power of the Government of the United States granted by Article I, Section 8, of the Constitution of the United States, in that said act interferes with the power of Congress to levy and collect taxes, duties, imposts and excises, and has,

without producing any revenue whatsoever for the State of Washington, completely destroyed, as found in the Findings of Fact, all federal revenue from the sale of oleomargarine within the State of Washington, under applicable acts of Congress.

ARGUMENT

The Findings of Fact show that the Washington Act completely destroyed this legitimate business of appellant.

These facts are admitted and indisputable: The appellant is not a manufacturer of oleomargarine. It had, however, for more than twelve years prior to the passage of the act in question been purchasing in California an uncolored oleomargarine known as Nucoa. It imported this product and sold it in the State of Washington, its annual sales of the product being in excess of 2,000,000 pounds, and its annual net profits derived from the business being in excess of $20,000 per year. The product imported and sold was a pure, healthful and nutritious article of food, and was so recognized by the United States Government for many years. Every person who bought the product knew what it was, knew that it was not butter. No misrepresentation or deception was practiced in its sale, nor was anything done, either by the appellant or other sellers of oleomargarine in the state, calculated to deceive anybody. While the product was not butter, was not represented as butter, yet, nevertheless, it competed with dairy butter. It was able to compete

with dairy butter because thousands of persons of moderate means preferred to buy it because of its lower cost.

When the act complained of was passed in March, 1931, the wholesale price of oleomargarine in the state was 20c a pound and the wholesale price of butter 32c a pound, a difference of 12c. At the same time the retail price of oleomargarine was 25c a pound and the retail price of butter 35c to 37c a pound, or a difference of 10c to 12c. All these prices remained approximately the same until the filing of the amended bill on September 18, 1931, about six months after the act went into effect. On September 13, 1932, the date of the final hearing, almost a year after the filing of the amended bill, the wholesale price of butter in Washington was 22c a pound, while the appellant had to pay for oleomargarine 12c, a difference of 10c. On the same date the retail price of butter was 24c to 26c a pound, while the appellant, if it could have sold oleomargarine free from tax, would have sold it to retail dealers at 14c a pound, and the retailers would, in turn, have sold it to the consuming public at 17c a pound. In the interval between the filing of the amended bill and the date of the final hearing there was a gradual and continuous decline of both butter and oleomargarine prices in the same proportion as that just set forth.

It is thus apparent that viewed from any angle the spread in price between butter and oleomargarine was never greater than 12c a pound throughout the entire period.

The imposition of a tax of 15c a pound, therefore

instantly and completely destroyed the oleomargarine business in the State of Washington.

The findings recite:

> "That since March 9, 1931, complainant by reason of said tax of fifteen cents per pound, and defendants' continuous threats to enforce the same has not imported from the State of California and sold any oleomargarine whatsoever; nor has any other person, firm or corporation falling within the terms of said act produced, refined, manufactured or compounded and thereafter sold such oleomargarine in the State of Washington for use and sale in the State of Washington, or imported into or sold in the State of Washington any such oleomargarine." (Finding of Fact XI)

Finding of Fact XII recites that since the date of the approval of the act the State of Washington has not received a dollar under the terms of the act, that no sales of oleomargarine subject to the tax under the act have been made and no applications have been made to the Collector of Internal Revenue of the United States in the State of Washington for either wholesale or retail licenses to sell oleomargarine, that no such licenses have been issued to dealers in the state, and that the Government of the United States has received no revenue from oleomargarine sales within the state.

Finding of Fact XXI in part reads as follows:

> "That the complainant, after March 9, 1931, could not have sold any oleomargarine in the State of Washington *except at a loss*, because the

said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine higher than that of butter."

A state may not consistently with the due process clause of the Fourteenth Amendment completely destroy a legitimate business.

Parenthetically we may say that this precise question was presented to, but not decided by, this court in the recent case of *Glenn v. Field Packing Co.*, 54 Sup. Ct. Rep. 138.

The findings put beyond all possibility of doubt that the business destroyed was a lawful one, because it cannot be illegitimate to sell openly and without misrepresentation or deception a pure, nutritious and healthful article of food and one recognized as such by the United States Government itself. If such a business is illegitimate, it is difficult, if not impossible, to conceive of a lawful business. Not only do the findings declare the business a lawful one, but such also is the holding of this court.

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, 9, this court said:

> "This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. *Its manufacture was recognized as a lawful pursuit*, and taxation was levied upon the manufacturer of the article, upon the whole-

sale and retail dealers therein, and also upon the article itself."

But surely it cannot be unlawful to sell, without deception or misrepresentation, a pure, nutritious and wholesome article of food which it is "lawful to manufacture."

Again, in *Collins v. New Hampshire*, 171 U. S. 30, 33, this court condemned a statute which was declared to be

> "a mere evasion of the direct prohibition contained in the Pennsylvania statute,"

and which last statute was declared void in the *Schollenberger* case.

Three of the greatest dairy states in the country are Wisconsin, New York and Minnesota. In the case of *John F. Jelke Co. v. Emery*, 193 Wis. 311, the court said:

> "The courts now take judicial notice of the fact that oleomargarine is a healthful, nutritious food. *Braun & Fitts v. Coyne* (C. C.) 125 Fed. 331; *People v. Arensberg*, 105 N. Y. 123, 59 Am. Rep. 483, 11 N. E. 277; *State v. Hanson*, 118 Minn. 85, 40 L. R. A. (N. S.) 865, 136 N. W. 412, Ann. Cas. 1913E, 405."

In *State v. Hanson*, 118 Minn. 85, the Supreme Court of Minnesota, after stating the effect of the decisions in the *Schollenberger* and *Collins* cases, said:

> "Since these decisions there has been no case denying the right of oleomargarine to be classed as a wholesome food product or upholding any prohibitory law."

In a somewhat early decision in New York, *People*

v. Marx, 99 N. Y. 377, cited in *Schollenberger* case (171 U. S. 1, 11) the court recites a portion of the testimony adduced in that case, and relating to the character of oleomargarine, as a food product. It then says:

> "Further testimony as to the character of the article being offered, the district attorney announced that he did not propose to controvert that already given. Testimony having been given to the effect that oleomargine butter was precisely as wholesome as dairy butter, it was, on motion of the district attorney, stricken out, and the defendant's counsel excepted.
>
> "The broad ground was taken at the trial, and boldly maintained on the argument of this appeal, that the manufacture or sale of any oleaginous compound, however pure and wholesome, as an article of food, if it is designed to take the place of dairy butter, is by this act made a crime. The result of the argument is that if, in the progress of science, a process is discovered of preparing beef tallow, lard, or any other oleaginous substance, and communicating to it a palatable flavor, so as to render it serviceable as a substitute for dairy butter, and equally nutritious and valuable, and the article can be produced at a comparatively small cost, which will place it within the reach of those who cannot afford to buy dairy butter, the bar of this statute is upon it."

The product sold, therefore, being nutritious and wholesome, the manufacture of it lawful, the sale

made without deception or misrepresentation, and the business of selling it legitimate, may the state destroy it?

In *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, this court considered a statute of Pennsylvania prohibiting the use of "shoddy" in the manufacture of comfortables, even when the shoddy was sterilized. Palmer Bros. Co., which had for many years been selling in Pennsylvania comfortables made of shoddy, brought a suit to enjoin the operation of the statute on the ground that it was in violation of the due process clause of the Fourteenth Amendment. A preliminary injunction having been denied, an answer was filed and a trial had "at which much evidence was introduced." What the evidence was on behalf of the enforcing officer is not precisely disclosed by the opinion, but the fair inference from the argument made on his behalf is that he contended that comfortables so made might be insanitary and were sold by fraudulent and deceitful means to the consuming public. This court held, however, that the record disclosed that shoddy might be rendered harmless by disinfection or sterilization, and that the manufacturer in that case used effective steam sterilizers.

You said (pp. 412, 415):

> "Shoddy-filled comfortables made by appellee are useful articles for which there is much demand. And it is a matter of *public concern* that the production and *sale* of things *necessary* or *convenient* for use should not be *forbidden*. They are to be distinguished from things that the State

is deemed to have power to suppress as inherently dangerous. * * *

"The constitutional guaranties may not be made to yield to mere convenience. *Schlesinger v. Wisconsin*, *ante*, p. 230. The business here involved is *legitimate* and *useful;* and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is *purely arbitrary* and *violates the due process clause of the Fourteenth Amendment. Adams v. Tanner*, 244 U. S. 590, 596; *Meyer v. Nebraska*, 262 U. S. 390; *Burns Baking Co. v. Bryan*, 264 U. S. 504."

But if a state may not prohibit the sale within its borders of comfortables made from shoddy when such shoddy is sterilized, *a fortiori*, it may not prohibit the sale of oleomargarine, a product which was held by the court of last resort of New York, nearly fifty years ago, to be a wholesome article of food, and the manufacture of which this court declared, as long ago as 1897, was a lawful pursuit and so recognized by Congress.

Moreover, it does appear from the *Weaver* case that there may be some danger to health from the use of "shoddy" comfortables unless properly sterilized. Antecedent treatment of the materials composing the comfortables is, therefore, necessary in order to make them safe for human use. All the experience of the past fifty years, however, has demonstrated that oleomargarine is not deleterious, but on the contrary, that it is a wholesome food. Since 1897 "there has been

no case denying the right of oleomargarine to be classed as a wholesome food product." Even if there were no judicial declaration on the subject, it would seem that a product of which over 5,000,000 pounds were sold annually in the State of Washington prior to 1931 (the state being only twenty-sixth in point of population) and a product on which the United States Government has collected for several years a tax on an annual consumption in excess of 300,000,000 pounds (of which fact this court will take judicial notice; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Nigro v. United States*, 276 U. S. 332) cannot be anything but a wholesome and nutritious food article, one which serves a vital public need and of which thousands of persons of moderate means in the State of Washington ought not to be deprived of the right to buy.

But if the sale of "shoddy" comfortables may not be forbidden because such comfortables are "necessary or convenient for use" surely the state cannot forbid the sale of a wholesome and nutritious food used by thousands of people of moderate means.

This conclusion is fortified, if it needs fortification, by the decision of this court in *Adams v. Tanner*, 244 U. S. 590, where it appears that the State of Washington passed an act which asserted that employment agencies which exacted a fee from workers for furnishing them employment were "detrimental to the welfare of the state," and forbade, under penalty of fine and imprisonment, the exaction of such a fee by such agencies. Certain employment agencies filed a

bill to enjoin the enforcement of the act. A statutory court dismissed the bill, but on appeal this court held the statute invalid on the ground that it attempted to prohibit a "service useful, commendable and in great demand." It was argued in support of the constitutionality of the measure that while such an agency "may be beneficial to some particular individuals, or in specific cases, economically it is certainly non-useful, if not vicious, because it compels the needy and unfortunate to pay for that which they are entitled to without fee or price, that is, the right to work." In reply to this contention, however, this court declared that while abuses might grow up and probably had grown up in connection with such agencies, and therefore there was adequate reason for hedging them about by proper regulations, nevertheless,

> "* * * this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution *cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.*"

This court then quoted from *Allgeyer v. Louisiana*, 165 U. S. 578, 589, the following:

> "'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; *to earn his livelihood by any lawful calling; to pursue any livelihood or avocation*, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned'."

As stated, this court in that case recognized that it was probable that abuses existed in connection with employment agencies. Nevertheless, the holding was that the business could not be prohibited.

In the case at bar it is not asserted by anyone that abuses exist in the sale of oleomargarine. On the contrary, the findings of fact expressly put out of view any such consideration. If a state cannot prohibit a business, even though it is probable that abuses exist in connection therewith, how can it prohibit a business indisputably lawful and free from all abuses?

In *New State Ice Co. v. Liebmann*, 285 U. S. 262, 278, this court again announced the applicable principle.

> "Plainly, a regulation which has the effect of *denying* or unreasonably curtailing the *common*

right to engage in a *lawful private business*, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or *prohibit lawful occupations* or impose unreasonable and unnecessary restrictions upon them.' *Burns Baking Co. v. Bryan*, 264 U. S. 504, 513, and authorities cited; *Liggett Co. v. Baldridge*, 278 U. S. 105, 113."

We have already quoted from the opinions in the cases of *People v. Marx*, 99 N. Y. 377, *J. F. Jelke Co. v. Emery*, 193 Wis. 311, and *State v. Hanson*, 118 Minn. 85, all of which hold that oleomargarine is recognized as a pure, wholesome and nutritious food, and all of which further hold that an act prohibiting its sale is in violation of the Fourteenth Amendment.

In the recent case of *Ex parte Bock*, 125 Cal. App. 375, it is said:

"It is further conceded that an ordinance purporting to prohibit the manufacture or sale of oleomargarine would be unconstitutional (*Jelke Co. v. Emery*, 193 Wis. 311, 214 N. W. 369, 53 A.L.R. 463; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; see also, *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 46 S. Ct. 320, 70 L. ed. 654), and that any ordinance indirectly accomplishing that result by means of imposing a tax in such amount as to be prohibitory would likewise be unconstitutional. In *re Dees*, 50 Cal.

App. 11, 194 P. 717; *Merced County v. Fleming*, 111 Cal. 46, 43 P. 392."

Several answers were attempted to be made to the foregoing argument in the court below, and as they will doubtless be repeated here, we consider them briefly.

Powell v. Pennsylvania Distinguished

(a) It was asserted, though halfheartedly, that the decision in *Powell v. Pennsylvania*, 127 U. S. 678, was still controlling and that a state might prohibit outright the sale of oleomargarine. The *Schollenberger* and *Collins* cases would seem to have foreclosed that contention. But if, despite those decisions, any possible doubt existed as to the inability of the state to prohibit the sale of oleomargarine, that doubt has been removed by what was said in *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, at p. 414:

> "'Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way.' *Quong Wing v. Kirkendall*, *supra*, 64. This is well illustrated by the *Powell* case compared with *Schollenberger v. Pennsylvania*, 171 U. S. 1. Every opinion is to be read having regard to the facts of the case and the question actually decided. *Cohens v. Virginia*, 6 Wheat. 264, 399. The facts clearly distinguish this case from the *Powell case*. There, it was *assumed* that most kinds of oleomargarine in the market were or might become injurious to health. Here, it is established

that sterilization eliminates the dangers, if any, from the use of shoddy."

There can be no assumption in this case than any oleomargarine sold in the State of Washington for many years might become injurious to health, because the explicit finding is "that all oleomargarine that has been sold by any persons, firms and corporations whomsoever in the State of Washington for many years last past and up to March 9, 1931, has had the characteristics and has been sold under the conditions described in paragraphs VII, VIII and IX of the findings of fact." Findings of fact VII, VIII and IX declare, in substance, that all oleomargarine sold in the state has been honestly manufactured, that the product is a pure, healthful and nutritious food, and has been sold under circumstances which do not permit of deception or misrepresentation.

A state cannot, under the guise of a prohibitive tax, destroy a lawful business.

(b) The second contention made in the court below was that even though the state could not directly prohibit the sale of oleomargarine, yet as the challenged act is an alleged revenue measure the fact that the tax levied thereby is so high as to absolutely destroy the business is wholly immaterial.

But courts are not bound by mere form, are not to be misled by mere pretense. They may look into the substance of things whenever they enter on an inquiry of whether the legislature is transcending the limits of its taxing power. The purpose and limit of any

act must be determined by its nature, and "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted" (268 U. S. 283).

In *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, it is said:

> "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, *but upon its practical operation and effect. Henderson v. Mayor of New York*, 92 U. S. 259, 268; *Stockard v. Morgan*, 185 U. S. 27, 36; *Galveston, Harrisburg & San Antonio Ry. Co v. Texas*, 210 U. S. 217, 227; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 28, 30; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362. . . .
>
> "Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power . . . . In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring

property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation."

In *Wagner v. City of Covington*, 251 U. S. 95, 102, this court said:

". . . and it is hardly necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the State, but rather upon the *practical operation and effect of the tax as applied and enforced.* The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it."

See also:

Minnesota v. Barber, 136 U. S. 313, 319;
Coppage v. Kansas, 236 U. S. 1, 15, 16;
American Mfg. Co. v. City of St. Louis, 250 U. S. 459, 462;
Macallen Co. v. Massachusetts, 279 U. S. 620, 625.

Well settled is it also that the invalidity of an act

may be shown by facts pleaded and established by evidence.

In *Weaver v. Palmer Bros. Co.*, 270 U. S. 402, 410, that rule is announced.

> "Invalidity may be shown by things which will be judicially noticed (*Quong Wing v. Kirkendall*, 223 U. S. 59, 64), *or by facts established by evidence.*"

Now, if a purported taxing law in its practical operation or administration for a year and a half produces no revenue, but at the same time prohibits a lawful business, this fact is entitled to serious weight in determining whether it is a genuine taxing measure or a mere subterfuge.

In *Nigro v. United States*, 276 U. S. 332, 353, this court declared that if any doubt had existed as to whether the Harrison Act was a mere pretext or a genuine revenue measure, that doubt had been removed because the Government had obtained a substantial revenue under the act. It was said:

> "Thus the income from the tax for the Government becomes substantial. Under the Narcotic Act, as now amended, the tax amounts to about one million dollars a year, and since the amendment in 1919 it has benefited the Treasury to the extent of nearly nine million dollars. If there was doubt as to the character of this Act—that it is not, as alleged, a subterfuge—it has been removed by the change whereby what was a nominal tax before was made a substantial one. It is certainly a taxing act now as we held in the *Alston* case."

But no revenue has been derived by the State of Washington from the operation of the act of 1931. Finding of Fact XII is not only explicit on this point, but it also declares that since the effective date of the act no application has been made by anyone to the collector of internal revenue of the United States in the State of Washington for wholesale or retail licenses under the federal statute to sell oleomargarine in the state, that no such licenses have been issued to dealers in the state, and that the United States Government has not derived a single cent of revenue from sales of oleomargarine within the state.

During the period of a year and a half, therefore, the act produced no revenue. The tax was so high as to absolutely prohibit the business. But an alleged revenue measure which produces no revenue and destroys a legitimate business is inconsistent with the due process clause of the Fourteenth Amendment.

> "Everything," says Mr. Cooley, in his work on Constitutional Limitations, "that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government." (5th ed., p. 603)

In his work on Taxation, when speaking more directly to the question, he says:

> "If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be understood to be left

to the judgment and discretion of the municipal government to be determined in the usual mode in which its authority to impose fees for purposes of revenue *would not warrant their being made so heavy as to be prohibitory thereby defeating the purpose.*" Cooley, Taxation (2d ed.) p. 599.

In *In re Quong Woo*, 13 Fed. 229, 233, Mr. Justice Field sitting at Circuit, said:

"Licenses for callings, trades, and employments may be required by the supervisors where the nature of the business demands special knowledge or qualifications on the part of the party, as in the case of dealers in drugs. They may also be required as a means of raising revenue for municipal purposes. But in neither case can they be required as a means of *prohibiting* any of the avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety. Nor can conditions be annexed to their issue *which would tend to such a prohibition.*"

In *McCray v. United States*, 195 U. S. 27, 64, this court said:

"Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play not for revenue but *solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the*

Constitution rests, that it would be the duty of courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

In the earlier case of *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S. 232, 237, in speaking of the state's power of taxation, this court said:

> "It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, *so long as they proceed within reasonable limits and general usage*, are within the discretion of the state legislature, or the people of the State in framing their Constitution."

The applicable principle is finely expressed in *Hager v. Walker*, 128 Ky. 1.

> "In considering this case we have not been unmindful that it is everywhere conceded that the power to lay taxes is the highest attribute of sovereignty, the exercise of which is confided alone to the law-making department of the government, and that the courts are reluctant to interfere with the discretion vested in the representatives of the people in imposing taxes that are necessary to sustain the government. Especially is this true of a property or ad valorem tax operating equally upon all property within

the territory affected. The amount of tax that shall be thus imposed, if uniform and not restrained by constitutional provisions, is vested exclusively in the legislative department of the state, and entirely beyond the power of the courts to control. *People v. Commissioners of New York City*, 67 U. S. 620, 17 L. ed. 451; *Union Pacific R. Co. v. W. S. Penniston*, 85 U. S. 5, 21 L. ed. 787. *But this unlimited freedom from judicial control does not extend to taxes imposed upon trades, occupations, or professions. Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. ed. 892; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. ed. 679. And the courts, when the question comes to them, have the undisputed right to determine whether or not a legislative act is in violation of the Constitution, although its purpose may be the raising of revenue."

See also

Child Labor Tax Case, 259 U. S. 20;
Hill v. Wallace, 259 U. S. 44;
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346;
Trusler v. Crooks, 269 U. S. 475.

If, disregarding these principles, a state legislature, under the guise of enacting a revenue measure, can destroy a legitimate business, then the consequences will be appalling. Under such a doctrine the state could authorize an excise tax of $5 a pound on butter, thus destroying the dairy industry; of $10 a dozen on eggs, thus destroying the poultry industry; of

$100 per thousand feet of lumber, thus destroying the lumber industry. These illustrations, of course, might be multiplied indefinitely. It is no answer to assert that the legislature would not do any of these things, because the question is not what a wise legislature might do, but what any legislature constitutionally has the power to do.

The force of the contention that no revenue was obtained under the act was sought to be impaired in the court below by the unworthy insinuation that the appellant and all others similarly situated had deliberately taken a loss of many thousands of dollars and completely sacrificed their entire business and good will, which even when the statute was declared invalid it would obviously take many years to regain, for the sole purpose of "making a case for the courts," and this view apparently found favor in the minds of two members of the statutory court (2 Fed. Supp. 423).

There was, of course, not a shred of testimony which could even lend color to such a contention. In the absence of such testimony, it is difficult to see how a court can assume a state of facts so contrary to the primal instinct of self-preservation and to ordinary business experience. Not only so, but the idea that the appellant "quit trading to make a case" is absolutely *inconsistent* with the twenty-first finding of fact, which declares "That the complainant, after March 9, 1931, could not have sold any oleomargarine in the State of Washington *except at a loss*, because the said tax of fifteen cents per pound added to complainant's cost would make the price of oleomargarine

higher than that of butter." Surely it cannot be the law that a merchant must continue in business at a loss in order to avoid a pure assumption, that he went out of business at a great sacrifice in order to make a case for a court.

Somewhat allied to the proposition just discussed is another made by counsel for defendants in the court below, and which also found favor with two members of that court. It is said that "there is no evidence that dealing in oleomargarine is plaintiff's exclusive business. The inference is that such dealing is a line among others in its general business." What allegation, what finding of fact, what testimony adduced can give rise to the inference that the appellant is engaged in another line of business, we are at a loss to know. But assuming that appellant was engaged in another line of business and made either a profit or loss from that business, how could that fact deprive it of the right to engage in the lawful business which the state has destroyed? May a lawyer be disbarred because he has an income from sources outside his professional activities? May a druggist be deprived of the right to sell drugs solely because he may sell ice cream? Is an annual income of $20,000 to be taken away from the appellant herein simply because he may also engage in the selling of shoes, or books, or butter, or olive oil? If so, the people of this country are but a short distance from the caste system prevailing in Oriental countries, and which system it has hitherto been our proud boast was wholly alien to our institutions.

One of the members of the three-judge court ap-

parently did not approve of either the last two contentions, but based his concurring opinion upon the ground that the time which had elapsed (a year and a half) did not constitute a test period of reasonable length under the conditions which had existed. *How long does a citizen have to be deprived of his property before he can be permitted to complain of such deprivation?* The retail price of butter on the day the act was approved was 35c to 37c a pound. On the date of the final hearing of this case the retail price of butter was 24c to 26c a pound. On what conceivable theory could either the court below or anyone else conclude that in the next three months, or six months, or nine months, or any period of time, the price of butter would become so high that oleomargarine could be sold in competition with it after the payment of a tax of 15c a pound? We say that if and when such a condition should ever prevail, then will be the time to modify the decree to which the appellant is now entitled.

Defendants' Cases Distinguished

(c) Defendants in the court below also sought to find support for their view, that the state can prohibit indirectly by taxation what it could not constitutionally do directly, in certain dicta found in the decisions of this court.

For instance, great emphasis is placed upon the following statement in *Hammond Packing Co. v. Montana*, 233 U. S. 331:

> It [the state] even may forbid the manufac-

> ture [of oleomargarine] altogether. *Powell v. Pennsylvania*, 127 U. S. 678."

The Montana statute under discussion in the *Hammond* case imposed a tax of one cent a pound on the sale of oleomargarine. The single and only point presented for decision was that the tax constituted an *unlawful discrimination under the equal protection clause*. There was not even a suggestion that the tax was *prohibitory*. The sentence above quoted is, therefore, pure dictum. Moreover, it is wholly out of harmony with the holding of this court in *Schollenberger v. Pennsylvania*, 171 U. S. 1, *Adams v. Tanner*, 244 U. S. 590, and *Weaver v. Palmer Bros.*, 270 U. S. 402.

McCray v. United States, 195 U. S. 27, was also relied upon. That case involved a federal tax of 10c a pound on *colored* oleomargarine. The decision of this court is based upon the ground

> "that the manufacture of *artificially colored* oleomargarine may be prohibited by a free government without a violation of fundamental rights" because of "the aptitude of oleomargarine *when artificially colored*, to deceive the public into believing it to be butter." (pp. 64, 62)

In the case at bar, however, no question of deception, public health or police power is even remotely involved. That the point here presented was, to say the least, left open in the *McCray* case is shown by the following quotation from that opinion:

> "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain

> to the judicial mind that the power had been called into play *not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests*, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred."

The point here presented was also not decided in the cases of *Williams v. Fears*, 179 U. S. 270, and *Alaska Fish Co. v. Smith*, 255 U. S. 44, because in the first case it was said:

> "That the question of whether the tax was so excessive as to amount to a *prohibition* on the transaction of the business did not arise and, indeed, was not raised." (179 U. S. 273)

While in the *Alaska Fish Co.* case, Mr. Justice Holmes remarked that

> "We need not consider whether abuse of the [taxing] power might go to such a point as to transcend it, for *we have not such a case before us.*" (255 U. S. 49)

The tax imposed by the act in question also violates due process of law in that it is a tax for a private purpose, to aid the dairy industry.

It is, of course, elementary that the taxing power can be exercised for a public purpose only, and that a tax for a private purpose violates due process, regardless of the amount of the tax.

Loan Association v. Topeka, 21 Wall. 655;
Fallbrook Irrigation Co. v. Bradley, 164 U. S. 112, 113;
Green v. Frazier, 253 U. S. 233, 238, 239.

Any tax levied for a private purpose or in aid of a private individual or industry is unconstitutional and void, and this is but a specific illustration of the general principle that public power can never be exercised for a private purpose.

Now, the invalid purpose to aid the dairy industry appears from the very face of Chapter 23, Laws of 1931. By Section 2 of the act, the excise tax of 15c a pound is imposed "on all butter substitutes," which butter substitutes are, by Section 1(a) of the act, defined as certain oleaginous combinations "sold or used as a substitute for butter." By explicit provision of the act, then, oleomargarine, is only taxed as "sold or used as a substitute for butter." Oleomargarine as such, without regard to its relation to butter, is not taxed. The tax is applied when and only when oleomargarine is sold or used as a substitute for butter.

It is not and cannot be claimed that the act is a police power measure. Reference to the title of the act alone would make impossible such a claim. More-

over, there are various statutes in the State of Washington regulating the advertisement and sale of oleomargarine. The act, therefore, is in no sense a police power statute, and it follows that the butter substitute language contained in the act is used *solely to designate the subject-matter taxed*, and to make clear and distinctly point out that the tax applies when and only when the article is "sold or used as a substitute for butter."

Not only so, but it is apparent that the members of the legislature knew when they passed the act that the tax would be prohibitory. At that time the difference in the retail price of butter and oleomargarine was from 10c to 12c. Nevertheless, a tax of 15c a pound was imposed on the sale of oleomargarine. The members of the legislature, therefore, knew that at that time such a tax would not produce a dollar of revenue and would prohibit the sale of oleomargarine.

Moreover, the opinion of the court below is alive with the thought that the purpose of this act was to aid the dairy industry. Speaking of the dairy farmer, it is said:

> "'Bowed by the weight of centuries he leans upon his cane and gazes on the ground; the emptiness of the ages in his face, and on his back the burden of the world * * *' (this overdraws the condition somewhat, but challenges the thought to the contrast), may not have been as vivid as when the state legislature sought to, in some degree, balance the burden, and 'give back the upward looking and the light' and in-

spire in the farmer courage and hope of at least partial relief."

And again:

"Placing in competition the farmers with 306,000 cows in the state, with a butter production of 33,000,000 pounds and some by-products, with the plaintiff engaged in selling in the state more than 5,000,000 pounds of oleomargarine per annum (aside from others so engaged), requiring the cow and the farm which supports her to contribute to the maintenance of state and local government taxation, and affording protection to the dealer in the state of oleomargarine without contributing to the public tax for such support, challenges the state's power to keep alive."

And again:

"The court may judicially notice the distressing condition of agriculture, present in the mind of the legislators, not only in this state, but throughout the nation, *Atchison, etc., Ry. v. U. S.*, 284 U. S. 249, 254, 52 S. Ct. 146, 76 L. ed. 273, and the unusual economic conditions at the time and since the effective date of the act, and that by reason of the excessive burdens there exists an unrest which may not be superficially passed, and, in view of the burden placed upon the complainant to establish unlawful the tax, we find ourselves unconvinced that the act complained of is so palpably unreasonable and arbitrary as to be forbidden; * * *."

2 Fed. Supp. 422, 423, 424 (R. 48, 52, 53).

That legislation whose purpose it is to protect a

private individual or industry is unconstitutional and void is established not only by *Loan Association v. Topeka*, and the many cases following it, but is likewise ably demonstrated in the cases of *John F. Jelke Co. v. Emery*, 193 Wis. 311, *State v. Hanson*, 118 Minn. 85, and *People v. Marx*, 99 N. Y. 377.

In the first of these cases it was said:

> "We are next urged to hold the act valid on the ground that the Legislature, in order to protect the Wisconsin dairy industry from unfair competition, may prohibit the manufacture and sale of oleomargarine. There is no basis in the evidence upon which a claim of unfair competition can be based. The argument is addressed to the proposition that, in order to promote one important industry, the Legislature may, in the exercise of its power to promote the general welfare, cripple or destroy another competing industry. It has been supposed that the Constitution was devised for the express purpose of withdrawing from the Legislatures the power to do that very thing. The framers of our Constitution, particularly the earlier ones, were quite as zealous in guarding against encroachment upon personal liberty by Legislatures as by executives * * *.
>
> "Under the facts proven in this case, whatever the economics of the situation may be, from the standpoint of constitutional right the Legislature has no more power to prohibit the manufacture and sale of oleomargarine in aid of the dairy industry than it would have to prohibit the

raising of sheep in aid of the beef cattle industry, or to prohibit the manufacture and sale of cement for the benefit of the lumber industry. In some cases a proper exercise of the police power results in advantage to a particular class of citizens and to the disadvantage of others. When that is the principal purpose of the measure, courts will look behind even the declared intent of Legislatures, and relieve citizens against oppressive acts, where the primary purpose is not the protection of the public health, safety or morals."

In the *Hanson* case the Supreme Court of Minnesota stated:

"But a law that destroys competition between two products of equal merit, that precludes the public from purchasing what it wants, is surely meretricious, unless there is some question of public health or some danger of fraud or deception that makes such a law beneficial. Clearly no question of public health is involved; and there seems no danger of deception that at all compares with the advantages that come to the people by having their choice between the more expensive butter and the cheaper substitute."

Similar is the declaration in the case of *People v. Marx*, 99 N. Y. 377:

"Who will have the temerity to say that these constitutional principles are not violated by an enactment which absolutely prohibits an important branch of industry for the sole reason that it competes with another, and may reduce the price

of an article of food for the human race? Measures of this kind are dangerous, even to their promoters. If the argument of the respondents in support of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would arguments then be found wanting to demonstrate the invalidity under the constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them.

"Illustrations might be indefinitely multiplied of the evils which would result from legislation which should exclude one class of citizens from industries, lawful in other respects, *in order to protect another class against competition.* We cannot doubt that such legislation is violative of the letter as well as of the spirit of the constitutional provisions before referred to, nor that such is the character of the enactment under which the appellant was convicted."

It is true that all three of the foregoing cases involved alleged exercise of the police power and not of

the taxing power, yet they, equally with *Loan Association v. Topeka*, 21 Wall. 655, demonstrate the principle that *a public power cannot be exercised for private purposes.* A law which deprives a citizen of his property, either by virtue of an excessive burden or by giving it to another for such other's benefit, is void, whether it is technically a law passed under the police power or the taxing power. The taxing power can no more be exercised to achieve such a result than can the police power. This, we think, is clearly demonstrated by the decision of this court in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 238, in which it is said:

> "In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, *rather than of private and particular interest*, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation."

Escape from this reasoning was sought to be predicated upon the view that the dairy farmers paid ad valorem taxes, while appellant, it was said (R. 49, 50), did not pay such taxes.

The answers are short and sharp. The premise that

appellant did not and does not pay such taxes is wholly unfounded and utterly inconsistent with Finding XI, which recites that the appellant "had and still has *within said state a large* amount of property *devoted to said business*" (R.59).

There was no testimony, either direct or from which even a remote inference could be drawn, that appellant does not pay taxes on this *large* amount of property, and surely the presumption is that the taxing officers did their duty and assessed the appellant's property. Moreover, a citizen's constitutional rights do not depend upon the amount of property he owns or the taxes he pays.

The Washington act constitutes an unlawful interference with the federal taxing power.

Congress, by an act which has long been on the books, has raised a large revenue from oleomargarine. It imposes a tax of 10c a pound on all colored oleomargarine, and a quarter of a cent a pound on all uncolored oleomargarine (U. S. Code, Title 26, §546, as amended March 14, 1931, ch. 520, §2; 46 Stat. 1549). In addition thereto, it imposes annual license fees, as follows: Upon manufacturers, $600; upon wholesalers of uncolored oleomargarine, $200; upon retailers of uncolored oleomargarine, $6 (U. S. Code, Title 26, §207).

Finding of fact XII is as follows:

> "That since the effective date of Chapter 23, Laws of 1931, no revenue has been received by the State of Washington under the provisions of

said act for the reason that, since said date, no sales of oleomargarine subject to tax under said act have been made; that since the effective date of said act no applications have been made to the collector of internal revenue of the United States in the State of Washington for wholesale or retail licenses under the Federal statutes to sell oleomargarine in the State of Washington, nor have any such wholesale or retail dealers' licenses been issued to dealers in the State of Washington under said Federal statutes since such date, *nor has the Government of the United States derived any revenue from sales of oleomargarine within the State of Washington since such date.*"

The fact, then, is that the legislature of the State of Washington, by levying a tax so great as to destroy completely the sale of oleomargarine within the State of Washington, has stripped the Federal Government of its entire revenue from that source within that state. By the same token, if the other forty-seven states of the Union should pass similar legislation and such legislation be held valid, the Federal Government would be completely stripped of a source of revenue which it has enjoyed for more than thirty years. If it be conceded that the forty-eight states have such power with respect to the taxation of oleomargarine, then it follows that the states, by levying prohibitive so-called excise taxes upon many other commodities, the tax on which supplies a large part of the internal revenue of the United States, can completely destroy the federal revenue from these sources.

The contention that we here make, that the Wash-

ington act of 1931 constitutes an unlawful interference with the federal taxing power conferred by Section 8 of Article I of the Constitution, is in no way in conflict with the principle that the state and federal governments have the power to tax the same subjects. That principle means no more than that the state government has the power, *within proper limitations*, to derive revenue from the same sources resorted to by the Federal Government. That principle, however, does not mean that the State of Washington in the purported exercise of its own taxing power (from which, according to the findings of fact, it derives no revenue itself) can completely destroy the federal revenue from the sale of oleomargarine. On the contrary, we say that because the powers conferred upon the Federal Government by the Constitution are paramount, the state cannot exercise its taxing power so as to render the federal taxing power wholly nugatory. The consequences of the opposite view were visioned by Mr. Justice Brewer, writing the opinion in *South Carolina v. United States*, 199 U. S. 437, 454, in which it was held that agents of the state engaged in the sale of intoxicating liquor were not relieved from the payment of the internal revenue tax imposed on such liquor by the United States Government. He said:

> "Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, *oleomargarine*, and all other objects of internal tax. If one state finds it thus profitable, other states may

follow, *and the whole body of internal revenue tax be thus stricken down.*

"* * *. Indeed, if *all the states* should concur in exercising their powers to the full extent, it would be *almost impossible* for the nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically *destroy the efficiency of the National Government.* If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *McCulloch v. Maryland, supra* (p. 431), for a complete answer:

" 'But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.'

"In other words, we are to find in the Constitution itself the full protection of the Nation,

and not to rest its sufficiency on either the *generosity* or the *neglect* of any State."

In an analogous situation involving the commerce clause, this court said in *Minnesota v. Barber*, 136 U. S. 313, 331:

> "On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota act will place this construction of it beyond question."

The principle that we advance is thus stated by Mr. Justice Gray in *Van Brocklin v. Tennessee*, 117 U. S. 151, 155:

> "While the power of taxation is one of vital importance, retained by the States, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet *even this power of a State is subordinate to*, and *may be controlled by*, the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective States, and cannot be controlled by them. The people of a State give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the

Union are not given by the people of a particular State, but by the people of all the States; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. *The attempt to use the taxing power of a State on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.* The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, *which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.*"

The same view is plainly indicated in *Schollenberger v. Pennsylvania*, 171 U. S. 1, 19, in the following passage:

> *"We think that what Congress thus taxes and recognizes as a proper subject of commerce cannot be totally excluded from any particular State simply because the State may choose to decide that for the purpose of preventing the importation of an impure or adulterated article it will not permit the introduction of the pure and unadulterated article within its borders upon any terms whatever."*

There is, of course, no doubt, as is held in *Flaherty v. Hanson*, 215 U. S. 515, and cases there cited, that a state cannot directly "place a burden on the lawful taxing power of the United States." And *Van Brocklin v. Tennessee, supra*, directly recognizes that the federal taxing power is paramount, and cannot be destroyed by state legislative measures. In *Lane County v. Oregon*, 7 Wall. 71, 76-78, Chief Justice Chase, speaking for the court, recognized that the taxing power of the state and federal governments over certain subjects is concurrent; but he further states that the concurrent power of the state "must not be so used as to embarrass or burden the federal government."

The foregoing authorities, therefore, declare that while the power of the state and federal governments over the same subject matter may be concurrent, yet, in the event of a conflict between the two, the power of Congress is supreme. In other words, the power of the state is concurrent with and independent of the

power of Congress where the same subject matter is taxed *only* to the point where an actual and substantial interference with the taxing power of Congress arises, in which event, the taxing power of Congress is paramount. This thought is expressed by Chief Justice Taney in his opinion in the License Tax Cases, 5 How. 513, 521, where he says:

> "The supremacy of the laws of Congress in cases of collision with state laws is secured in the article which declares that the laws of Congress passed in pursuance of the powers granted shall be the supreme law; and it is only where both governments may legislate on the same subject that this article may operate."

We may readily concede that the state could, in the exercise of its taxing power, destroy any business, *which it could destroy under its police power*, and thus destroy the federal revenue from such business. But such concession cannot aid appellees because the challenged act is not a police power measure and the oleomargarine business is no longer one which the state can completely prohibit.

Schollenberger v. Pennsylyvania, 171 U. S. 1;

Collins v. New Hampshire, 171 U. S. 30;

Weaver v. Palmer Bros. Co., 270 U. S. 402.

We, therefore, respectfully submit on this branch of the argument that the Washington act here challenged is invalid because the tax imposed by that act is so great as to destroy the legitimate business of selling oleomargarine in the state, and thus ren-

ders it impossible for the federal government to receive any revenue whatsoever from persons formerly engaged in that business.

Admitting, for the purposes of the present case, the power of the state to levy a reasonable tax on oleomargarine, a tax in an amount not great enough to prohibit the collection of revenue by the federal government from that source, we, nevertheless, respectfully submit that any state tax which is completely destructive of the federal revenue would, if held valid, permit the states to strike down the entire internal revenue system of the United States, and thus permanently to cripple the federal government; and that this is particularly true of a tax law that is not a genuine tax law, that raises no revenue for the state, destroys a legitimate business, and destroys with it a substantial source of federal revenue.

Nor does anything said in *Plumley v. Massachusetts*, 155 U. S. 461, weaken the force of the argument just made. In that case (decided in 1894) it appears that Massachusetts had passed an act entitled "An act to *prevent deception* in the manufacture and sale of imitation butter." It made criminal the sale of oleomargarine "which shall be in imitation of *yellow* butter." The statute, therefore, was a pure police power measure. Plumley, having been convicted in the state courts, sought on appeal to have this court declare that because Congress, by the act of 1886, had placed a tax on oleomargarine, the Massachusetts act, passed for the purpose of *protecting its*

people from deception, was void. That contention was refuted in the following language:

> "The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which *lawfully forbade* such manufacture or sale, or to disregard any regulations which a State might *lawfully* prescribe in reference to that article."

True, the court called attention to §3243 of the Revised Statutes, which provides, in part:

> "nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes."

But certainly the clause just quoted must be given a reasonable construction, and therefore Congress can only be presumed to have intended that the exercise of its taxing power upon a commodity should not "prohibit any State from placing a (reasonable) duty or excise on the same trade or business." It can hardly be presumed that Congress, speaking of its own exercise of the taxing power, was in the same breath conceding to the states the power to levy a *prohibitory* tax, a tax which is in reality not a tax at all, from which the state derives no revenue, and which would render the exercise of the congressional power of taxation wholly nugatory. Congress was merely conceding the states' right to levy a reasonable revenue-producing tax, and not one which was so unreasonable as to yield the state no revenue and

at the same time destroy all federal revenue from that source. It cannot be presumed, from the language of the clause of the act just quoted, that Congress intended to give to the states a power by which "the whole body of internal revenue tax [might] be thus stricken down," and thus "practically destroy the efficiency of the National Government" (199 U. S. 454, 455).

The Washington act complained of violates the commerce clause of the Federal Constitution.

The amount of the tax imposed by the 1931 act is so burdensome as to destroy interstate commerce in oleomargarine, because the tax burdens that commerce not merely incidentally but has directly and completely destroyed the entire business of importation carried on by the appellant prior to the approval of the act.

The findings of fact state that for many years prior to the passage of the act the appellant imported oleomargarine from the State of California for the purpose of sale in the State of Washington, but that since March 9, 1931, it has not imported any oleomargarine from California or sold any oleomargarine, for the sole reason that by virtue of the threats of the defendants to enforce the act oleomargarine could not be sold except at a loss (Findings Nos. V and XI).

The excessive tax, therefore, imposed by the Washington act has put a complete stop to the interstate importation previously carried on by the appellant.

"The practical effect" of the act, therefore, has been to destroy the interstate commerce previously conducted by the appellant.

It is true that by Section 13 of the act the legislature declared it had no intention to violate the commerce clause of the Federal Constitution, yet this declaration can be of no force and effect under the decisions of this court heretofore cited and quoted, if the act, *in its practical working and operation*, constitutes an unlawful burden on interstate commerce.

In the *Schollenberger* case it appears that the State of Pennsylvania had undertaken by legislation to prohibit the sale of oleomargarine in that state. By *necessary implication*, the statute prohibited the sale of *imported* oleomargarine. This court, reversing the Supreme Court of Pennsylvania, held that the manufacture of oleomargarine was lawful, and that the article could not be completely excluded from the state, because such exclusion of a legitimate article of commerce constituted a violation of the commerce clause.

The New Hampshire statute involved in the case of *Collins v. New Hampshire* did not in terms prevent the sale of imported oleomargarine, nor did it even expressly undertake to prohibit the sale at all, but it provided that oleomargarine could only be offered for sale provided it was colored pink. This court held that on account of the provision requiring pink coloring, the statute, "in practical effect," prevented *all* sales of oleomargarine, and therefore prevented *im-*

portation for the purpose of sale and thus *directly restrained interstate commerce.*

It follows, from the doctrine of these two cases, that any legislation which has "the practical effect" of prohibiting the introduction of oleomargarine from one state into another, for the purpose of sale, constitutes a violation of the commerce clause. The Pennsylvania and the New Hampshire acts referred to did not *in terms* prevent the importation into the states of Pennsylvania and New Hampshire of oleomargarine. What they did do was to prevent the sale of oleomargarine after it was imported into the state, and thus rendered the importation absolutely useless.

The Washington act here challenged, in its legal incidents, is exactly the same as the Pennsylvania act. The challenged act does not impose an excise tax on the appellant's imports from the State of California, but it does impose a tax upon all sales made within the state, and Section 11 of the act provides that if oleomargarine is received under circumstances where the distributor is tax-free under the Constitution of the United States, the person next in line who is within the taxing power of the state must pay the tax. The legislature, therefore, has so drawn the act that the commodity imported by the appellant from without the state cannot escape the tax, and can only come into the hands of the consumer with the excessive tax paid. *The price of the commodity is thus raised so as to render its sale absolutely impossible.* The ultimate consumer will not buy because the price of the article with the tax paid is greatly in excess

of the price of butter. The retailer will not buy from the appellant because, if he bought the commodity with the tax paid, he could not, because of its excessive cost, sell it in competition with butter; and the appellant cannot buy because it is impossible for it, under the circumstances, to sell to the retailer. "The practical effect" of the act is, therefore, to prevent all importation of oleomargarine for the purposes of sale by the appellant and all others similarly situated.

As late as *Macallen v. Massachusetts*, 279 U. S. 620, 626, 627, this court has said:

> "A tax laid in terms on the occupation of an importer is in effect a tax on imports. *Brown v. Maryland*, 12 Wheat. 419, 444. Answering the contention that a state may tax an occupation, and that this tax was nothing more, Chief Justice Marshall said:
>
> " 'It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. . . . *So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not the*

right to do, because it is prohibited by the constitution.'

. . .

"A tax on sales made by an auctioneer is a tax on the goods sold, and, where such goods are imported and sold for the importer, the law authorizing the tax is void as imposing a duty on imports. *Cook v. Pennsylvania*, 97 U. S. 566.

"A stamp tax upon a bill of lading is in substance and effect a tax upon the things transported, because of its necessary association with the shipment. *Almy v. California*, 24 How. 169, 174. And see *Woodruff v. Parham*, 8 Wall. 123, 138."

It seems almost too plain for argument, then, that interstate commerce, as previously carried on by the appellant and recognized as legitimate in the *Schollenberger* and *Collins* cases, is directly burdened by this tax and is completely prohibited and destroyed.

It is no answer to the foregoing argument to say that the act does not in terms prohibit interstate commerce, or that the act undertakes expressly to negative any intention to interfere with interstate commerce, when the "practical effect" of the imposition of the tax is to make it impossible to sell within the state the commodity theretofore imported from without the state. The prohibitory result, even if thus achieved by devious means, is just as unconstitutional by reason of its "practical affect" as if the prohibition were imposed directly.

Nor is it any answer to say that if the tax were only one or two cents a pound, and the commodity could thus ultimately be sold in competition with but-

ter, no unconstitutionality under the commerce clause would result in such event. It may be readily conceded, for the purposes of the present case, that a tax of one cent or two cents, or probably more, a pound, would not render the act violative of the commerce clause, because the commodity could still ultimately be sold at a profit and in competition with butter. But a tax of fifteen cents a pound, which, under the findings of fact, makes importation from without the state *useless*, because it renders *ultimate sale impossible, is* nevertheless violative of the commerce clause and is squarely within the rulings in the *Schollenberger* and *Collins* cases.

The Washington act is further violative of the commerce clause because it, in legal effect, amounts to a protective tariff, which the state has no power to impose. The act imposes a tax, in legal effect, upon oleomargarine imported from without the state, and leaves a directly competing commodity, to-wit, butter, untaxed. A state has no power to levy a protective tariff against foreign commodities for the protection of competing local commodities.

In *Gramling v. Maxwell*, 52 F. (2d) 256, 258, a three-judge federal court recently said:

> "But the state may not, in its tax on peddlers or other taxes, *discriminate against the products of other states.* To do so is in effect to *enact a protective tariff* against the products of other states; and a tax which makes such discrimination is violative of clause 3 of section 8 of the first article of the Constitution of the United

States, because it *constitutes a burden upon interstate commerce.*"

In *Darnell v. Memphis*, 208 U. S. 113, 122, this court said, quoting from *Walling v. Michigan*, 116 U. S. 446, 455:

> "A discriminating tax imposed by a state operating to the disadvantage of the products of other states when introduced into the first mentioned state, is, in effect, a regulation in restraint of commerce among the states, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

And in *Walling v. Michigan*, 116 U. S. 446, 457, 458, the following language from a Missouri case is approved by the Supreme Court of the United States:

> "But whatever may be the motive for the tax, whether revenue, restriction, retaliation, or protection of domestic manufactures, it is equally a regulation of commerce, and, in effect, an exercise of the power of laying duties on imports, and its exercise by the states is entirely at war with the spirit of the constitution, and would render vain and nugatory the power granted to Congress in relation to those subjects. Can any power more destructive of the union and harmony of the States be exercised than that of imposing discrimatory taxes or duties on imports from other states? Whatever may be the motive for such taxes, they cannot fail to beget irritation and to lead to retaliation; and it is not difficult to foresee that an indulgence in such a course of legislation must inflame and produce a state

of feeling that would seek its gratification in any measures regardless of the consequences."

It follows, therefore, that the Washington act under attack in its *practical operation* taxes imported oleomargarine, leaving the competing local commodity, butter, untaxed, and thus constitutes an unlawful discrimination under the commerce clause.

But even if the act did not discriminate against imported goods *as such*, the result would be the same.

In *Schollenberger v. Pennsylvania*, 171 U. S. 1, the law applied to intrastate commodities as well as to commodities imported from without the state, without discrimination, but this did not save the law from condemnation under the commerce clause.

And in *Minnesota v. Barber*, 136 U. S. 313, 326, this court said:

> "It is, however, contended, in behalf of the State, that there is, in fact, no interference, by this statute, with the bringing of cattle, sheep and swine into Minnesota from other States, nor any discrimination against the products or business of other States, for the reason—such is the argument—that the statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States. *To this we answer, that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by*

a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. Robbins v. Shelby Taxing District, 120 U. S. 489, 497; Case of the State Freight Tax, 15 Wall. 232. *The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this statute is not avowedly, or in terms, directed against* the bringing into Minnesota of the products of other States, *its necessary effect* is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb or pork, however free from disease may have been the animals from which it was taken."

It is respectfully submitted, therefore, that the Washington act complained of violates the commerce clause of the Federal Constitution, because it completely prohibits, in its practical operation, importation of goods from without the state for the purpose of sale,—contrary to the rulings in *Schollenberger v. Pennsylvania*, 171 U. S. 1, and *Collins v. New Hampshire*, 171 U. S. 30.

The sole answer attempted to be made to this argument in the court below was the citation of the case of *Sonneborn Bros. v. Cureton*, 262 U. S. 506. That case is not an authority against us, but sustains the

very position for which we contend, as is demonstrated by the following language (pp. 513, 514):

> "Without questioning the reasoning used to reach the conclusion in *Leisy v. Hardin*, it is enough to point out the radical difference between state legislation *preventing any sale at all* accompanied by forfeiture of the merchandise, and a provision for an occupation tax applicable to all sales of such merchandise whether domestic or brought from another State. *The one plainly interferes with or destroys the commerce*, the other merely puts the merchandise on an equality with all other merchandise in the State and *constitutes no real hindrance to introducing the merchandise into the State for sale* upon the basis of equal competition. Mr. Justice White in his opinion in *American Steel & Wire Co. v. Speed*, thus distinguished *Leisy v. Hardin* from the case then before the Court. *The obstruction to interstate commerce in Leisy v. Hardin was like that in Schollenberger v. Pennsylvania*, 171 U. S. 1, 12, in *Railroad Co. v. Husen*, 95 U. S. 465, 469, in *Minnesota v. Barber*, 136 U. S. 313, in *Brimmer v. Rebman*, 138 U. S. 78, in *Scott v. Donald*, 165 U. S. 58, 97, in *Vance v. Vandercook Co., No. 1*, 170 U. S. 438, and in *American Express Co. v. Iowa*, 196 U. S. 133."

In the *Sonneborn* case, therefore, this court made it convincingly clear that any state legislation which "prevents any sale at all" of articles imported from without the state for the purpose of sale is invalid, because it "plainly interferes with and destroys com-

merce," and that legislation applicable to articles imported from without the state for the purpose of sale is valid *when and only when* the legislation "constitutes *no real hindrance* to introducing the merchandise into the state for sale."

The practical operation and effect of the Washington act achieves the very consequence which Chief Justice Taft in the *Sonneborn* case said *could not be achieved.*

Again, we readily concede that the *Sonneborn* case permits a reasonable excise tax on merchandise imported from without the state for purpose of sale within the state because such tax "constitutes *no real hindrance* to introducing the merchandise into the state for sale"; but where the tax is so great as not only to constitute a "real hindrance" but wholly prevents "the introduction of the merchandise into the state for sale," such legislation conflicts with the decision in the *Sonneborn* case as well as the holding in *Schollenberger v. Pennsylvania.*

It was suggested in the court below that because, under the present Washington act, a private consumer could order oleomargarine direct from a seller located without the state, said sale being consummated without the state, the commerce clause was not violated. But such a construction of the commerce clause is far too narrow, and wholly misconceives the effect of the decision in the *Sonneborn* case. If that view were correct, then it would follow that the only interstate transaction now protected by the commerce clause is a sale made from without the state directly to a consumer within the state. Under that view, the

commerce clause would be reduced to protecting business transactions within this narrow compass.

But if the commerce clause merely protects a cumbersome and expensive mail order business conducted from without the state, it has, indeed, lost vitality. Such is not the law. It had been the law long before *Schollenberger v. Pennsylvania*, and has been the law at all times since, that an article imported from without the state for the purpose of being thereafter sold within the state is entitled to the protection of the commerce clause against unduly burdensome state legislation.

The findings of fact show that since 1919 the appellant had been importing oleomargarine from without the state for the purpose of making sales thereafter within the state. The state cannot today impose an undue burden upon this method of conducting interstate commerce. Legislation relative to such transactions is only valid if it, in the language of the *Sonneborn* case, "constitutes no real hindrance to introducing the merchandise into the state for sale;" and that phrase unquestionably means no real hindrance to introducing the merchandise *into the state for sale*, to-wit, for sale *after its introduction*.

The only other reply attempted by counsel for defendants in the court below, is the following:

> "If the premise were well founded, viz: that the act was designed to and does in fact prohibit all trade in oleomargarine, the conclusion might be sound but as we have already indicated, the court is not warranted in finding that the act

is other than its context implies, a taxing measure."

But a statute which, in a year and a half between the time of its becoming effective and the final hearing in this case, did not and could not produce one cent of revenue to the state, can hardly be called a taxing measure.

CONCLUSION

In conclusion we say:

1. That the oleomargarine business is a legitimate business which cannot be destroyed in the exercise of the police power, and therefore cannot be destroyed in an alleged exercise of the taxing power.

2. That an alleged exercise of the taxing power which, as in the present case, produces no revenue whatsoever, is an abuse of power when applied to a legitimate business.

3. That it is almost universally conceded that an occupational tax prohibitive in amount is violative of due process of law, and that while the power of the legislature to levy an unlimited ad valorem or property tax may be conceded, nevertheless, a tax upon a legitimate occupation is constitutional only when reasonable in amount, and not destructive of the business.

4. That if it be conceded that the legislature, by a prohibitive occupational tax, has the power to destroy a legitimate business, then it must likewise be conceded that a legislature has the power, by excessive occupational taxes, to destroy every legitimate merchandising business.

5. That a tax which is imposed, not for a public purpose but in aid of a competing private industry, to-wit, the dairy industry, constitutes a deprivation of due process of law.

6. That a tax which in its practical effect completely prevents the importation of goods into a state from other states for the purposes of sale constitutes an unlawful burden upon and a prohibition of interstate commerce, in violation of the commerce clause of the Constitution.

7. That a tax which discriminates against goods brought in from without the state in favor of a competing commodity produced within the state constitutes a violation of the commerce clause.

8. That any tax, whether discriminatory or not, and even though not completely prohibitory, which imposes a real hindrance to interstate commerce, is unconstitutional and void under the commerce clause.

9. That a state tax which unlawfully burdens the taxing power of the United States, by completely destroying the federal revenue, is unconstitutional and void, because of the supremacy of the laws of Congress under the express language of the Federal Constitution.

Respectfully submitted,

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APPENDIX

Chapter 23
(Session Laws, 1931, p. 77)

EXCISE TAX ON SALE OF BUTTER SUBSTITUTES

AN ACT relating to revenue and taxation, requiring distributors as therein defined to pay an excise tax on the sale of all butter substitutes, providing for licensing dealers therein, fixing a penalty for a violation of the provisions of the act, and declaring that this act shall take effect immediately.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. (a) The term "butter substitute" whenever used in this act shall be held and construed to mean and include any compound or compounds of animal or vegetable fats, such as tallow, beef fat, suet, lard, lard oil, suine, lardine, intestinal fat, offal fat, cocoanut oil, olive oil, cottonseed oil, peanut oil, in combination with milk, butter or any product of milk or butter, either colored or uncolored, that does not contain eighty per cent (80%) of milk or butter fat, and is sold or used as a substitute for butter.

(b) The term "distributor" whenever used in this act shall be held and construed to mean and include any person, firm or corporation which produces, refines, manufactures or compounds and thereafter sells such butter substitute in the state of Washington for use and sale in this state, or who imports and sells such butter substitute into this state, except as hereinafter provided.

Sec. 2. That in addition to the taxes now provided

for by law each and every distributor, as defined in this act, who is now engaged or who may hereafter engage in his own name, or in the name of others, or in the name of representatives or agents in this state, in the sale of butter substitutes as herein defined, shall not later than the fifteenth day of each calendar month render a sworn statement to the director of agriculture of the State of Washington of all such butter substitute sold by him or them in the state of Washington during the preceding calendar month, and pay an excise tax of fifteen cents per pound on all butter substitutes so sold as shown by such statement in the manner and within the time hereinafter provided.

Sec. 3. All distributors of such butter substitutes in the state of Washington shall file a duly acknowledged certificate with the director of agriculture on forms prescribed, prepared and furnished by him, which shall contain the name under which such distributor is transacting business within the state of Washington; such certificate shall state the place or places of business and location of distributing stations of the distributor in the state of Washington, the name and address of the manufacturing agent, the names and addresses of the several persons constituting the firm or partnership, and if a corporation the corporate name under which it is authorized to transact business, and the names and addresses of its principal officers, resident general manager and attorney-in-fact. If such distributor is an association of persons, firm, partnership or corporation organized under the laws of another state, territory or nation,

if it has not already done so, it must first comply with the laws of the state of Washington relating to the transaction of its appropriate business therein. No distributor, as herein defined, shall, after the law goes into effect, sell any butter substitute until such certificate is furnished, as required by this act.

Sec. 4. Every distributor of such butter substitute shall render to the director of agriculture of the state of Washington, on or before the fifteenth day of each month, on form prescribed, prepared and furnished by said director, a sworn statement of the number of pounds of butter substitute sold by it, him or them during the preceding calendar month, which statement shall be sworn to by one of the principal officers in case of a domestic corporation, or by the resident general manager or attorney-in-fact in case of a foreign corporation, or by the managing agent or owner in case of a firm or association, and shall contain a statement of the quantities in pounds of butter substitute sold. Bills shall be rendered to dealers in butter substitutes as herein defined. Said bills shall contain a statement printed thereon in a conspicuous place that the distributor of such butter substitute has assumed the liability to the state for the license tax therein imposed and that he, it or they will pay said license tax on or before the fifteenth day of the following month.

Sec. 5. Said excise tax shall be paid on or before the fifteenth day of each month to the director of agriculture of the state of Washington, who shall receipt the distributor therefor and place the same in the

state treasury to the credit of the general fund of the state of Washington.

Sec. 6. Every distributor of such butter substitute shall keep a record of such forms as may be prescribed by the director of agriculture of all purchases, receipts, sales and distributions of such butter substitutes, and such record shall at all times during the business hours of the day be subject to inspection and examination by the director of agriculture, or his deputies, or such other officers as may be provided by law.

Sec. 7. All butter substitutes sold in containers, packages or cases shall bear a sticker tag showing the date of invoice upon which the same was delivered, the name of the distributor of such butter substitutes, and shall contain in a statement that the liability for the license tax thereon has been assumed by such distributor.

Sec. 8. It shall be unlawful for any person, firm or corporation dealing in butter substitute to receive or accept any delivery or shipment of butter substitute from any distributor or to pay for the same, or to sell or offer the same for sale, unless the statement provided for in section seven (7) appears upon the container and upon all invoices for such butter substitute. If any shipment of butter substitute is received by any person, firm or corporation from any distributor, or is sold or offered for sale by him or them, upon which the requirements of sections 4 and 7 of this act are not complied with, such person, firm or corporation shall be deemed guilty of a misdemeanor. Provided, That the provisions of this

section shall not apply to the receipt or sale of butter substitutes which are exempt from state tax under the constitution and laws of the United States.

Sec. 9. The director of agriculture shall have the power and it shall be his duty from time to time, to adopt, publish and enforce rules and regulations not inconsistent herewith for the purpose of carrying out the provisions of this act.

Sec. 10. Said excise tax shall not be imposed on butter substitutes when sold for exportation from the state of Washington to any other state, territory or nation: Provided, however, The distributor or exporting agent shall make a statement each month to the director of agriculture showing the amount of butter substitute exported.

Sec. 11. If any person shall receive such butter substitutes in such form and under such circumstances as shall preclude the collection of this tax from the distributor by reason of the provisions of the constitution and laws of the United States, and shall thereafter sell such butter substitute in such manner and under such circumstances as may subject such sale to the taxing power of the state, such person shall be considered a distributor and shall make the same reports, pay the same taxes and be subject to all the other provisions of this act relating to distributors of butter substitutes.

Sec. 12. Any distributor, association of persons, firm or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor.

Sec. 13. Nothing in this act contained shall be construed to require the payment of the excise tax

herein provided for, or the doing of any acts which would constitute an unlwaful burden upon the sale or distribution of butter substitutes as herein defined, in violation of the constitution or laws of the United States.

Sec. 14. If any section, subdivision, sentence or clause of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of the act.

Sec. 15. Whereas the revenues of the state are insufficient to support the state government and its existing public institutions as at present organized and this act will furnish additional and necessary revenues now required by this state, and will aid in the immediate preservation of the public peace, health and safety, therefore this act is necessary for the immediate preservation of the public peace, health and safety, support of the state government and its existing public institutions and shall take effect immediately.

Passed the Senate February 27, 1931.

Passed the House February 26, 1931.

Approved by the Governor March 9, 1931.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1933.

A. MAGNANO COMPANY, a corporation, Appellant,

v.

G. W. HAMILTON, as Attorney General of the State of Washington, WALTER J. ROBINSON, as Director of Agriculture of the State of Washington, and CLARENCE D. MARTIN, as Governor of the State of Washington, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

Chapter 23, Laws of Washington for 1931 (hereinafter referred to as chapter 23) placed an excise tax of fifteen cents a pound on all butter substitutes sold within the state not for export. (R. 10.) It was before the Supreme Court of the State of Washington in *State ex rel. Reiter v. Hinkle*, 161 Wash. 652.

From March 9, 1931, the effective date of chapter 23, Laws of Washington for that year, until September 13, 1932, the date of the trial below, appellant made no attempt whatever to sell oleomargarine or "Nucoa" (R. 38).

The sole reason given was that if the tax were added to the import price existing between those dates, they would have had to ask a price which would be higher than the price of butter as it was between those dates (R. 37).

No evidence was offered whatever to show the production cost of oleomargarine or that the arbitrarily fixed import price could not be profitably lowered. Objection was made to an offer of proof that the production cost of oleomargarine was only 6c a pound (R. 40).

This case was tried on September 13, 1932 (R. 36). The opinion below (2 Fed. Supp. 417) was filed on January 17, 1933.

The Findings of Fact, Conclusions of Law and Judgment, however, were not filed by appellant until August 29, 1933 (R. 55).

Of course the findings made by the court were based on the evidence as of September 13, 1932, and it will not be disputed that since that date (September 13, 1932) oleomargarine or Nucoa has been sold in the state of Washington in interstate commerce and the federal tax thereon paid.

The act complained of expressly provides (section 10) that sales for export from the state are not taxable (R. 13) and section 13 thereof is as follows (R. 14):

"Sec. 13. Nothing in this act contained shall be construed to require the payment of the excise tax herein provided for, or the doing of any acts which would constitute an unlawful burden upon the sale or distribution of butter substitutes as herein defined, in violation of the constitution or laws of the United States."

It was pointed out in both opinions below that interstate commerce was not affected except incidentally. Said Judge Neterer in his opinion (R. 52):

"The state excise tax does not burden plaintiff's business, if delivered from the plant direct to the consumer * * *."

In his concurring opinion below, Judge Cushman said (R. 54-5):

"The act clearly shows that it was not intended to forbid interstate sales of oleomargarine. No showing has been made as to whether complainant's interstate sales have increased since the law became effective and to what extent. With the law taxing intrastate sales and leaving interstate sales untaxed it is quite possible that the law has benefited rather than injured the complainant insofar as its customers are of the description particularly pointed out above."

ARGUMENT

Appellant would have this court hold that the tax is confiscatory and for the sole purpose of burdening the oleomargarine business in aid of the dairy industry.

I.

The Court Will Not Inquire Into the Motives of the Legislature in Enacting a Law.

In the case of *Southwestern Oil Co. v. Texas*, 217 U. S. 114, at page 126, in sustaining an occupation tax upon wholesale dealers in oil, the supreme court said:

"* * * What were the special reasons or motives inducing the state to adopt the classification of which the Oil Company complains, we do not certainly know. Nor is it important that we should certainly know. It may be that the main purpose of the state was to encourage retail dealing in the particular articles mentioned in section 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the State to proceed on that ground. We may repeat what was said in *Delaware Railroad Tax Cases*, 18 Wall. 206, 231, that 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' But we will not speculate as to the motives of the State, and will assume—the statute, either upon its face or by its necessary operation, not suggesting a contrary assumption—that the State has in good faith sought, by its legislation, to protect or promote the interests of its people. * * *"

In *United States v. Des Moines & Company*, 142 U. S. 510, the court said, at page 544:

"* * * The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge, and in good faith. * * *."

In *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, at page 151, the court said:

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of congress. (Citing cases.) Nor may the court enquire into the wisdom of the legislation. * * *."

In the case of *Arizona v. California*, 283 U. S. 423 (the *Boulder Canyon* case), at page 455, Mr. Justice Brandeis writing the opinion of the court, said:

"Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not enquire. * * *."

And in an appended note at the bottom of the same page he says:

"Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers. * * *."

Realizing this rule appellant argues that the excessive rate of the tax in question in practical operation and effect destroys its business and points to the fact that since the effective date of the tax in question (March 9, 1931) and the 13th day of September, 1932, no taxable sales of oleomargarine had been made within the state.

Appellant therefore contends that while this act is nominally a taxing measure in truth and in fact it seeks to prohibit the oleomargarine business, something which could not be accomplished directly under the police power.

There are many answers to this contention.

In the first place it cannot be admitted that a prohibition of sales of oleomargarine would be unconstitutional.

In *Powell v. Pennsylvania*, 127 U. S. 678, the validity of an act of Pennsylvania prohibiting the manufacture and sale of oleomargarine within the state was sustained.

Appellant argues, however, that *Powell v. Pennsylvania*, 127 U. S. 678, is over-ruled by *Schollenberger v. Pennsylvania*, 171 U. S., page 1, and *Collins v. New Hampshire*, 171 U. S., page 30, both of which cases involved the sale in original packages of oleomargarine brought into the state in interstate commerce. The court held that the acts prohibiting or burdening original package sales offended against the commerce clause and were therefore not valid.

The court in the *Schollenberger* case simply distinguished the *Powell* case but did not over-rule it. In *Schollenberger v. Pennsylvania*, 171 U. S., at page 15, the court said:

"The *Powell* case did not and could not involve the rights of an importer under the commerce clause. The right of a State to enact laws in relation to the administration of its internal affairs is one thing,

and the right of a state to prevent the introduction within its limits of an article of commerce is another and a totally different thing. Legislation which has its effect wholly within the State and upon products manufactured and sold therein might be held valid as not in violation of any provision of the Federal Constitution, when at the same time legislation directed towards prohibiting the importation within the State of the same article manufactured outside of its limits might be regarded as illegal because in violation of the rights of citizens of other States arising under the commerce clause of that instrument."

After the decision in the *Schollenberger* case, 171 U. S. 1, the congress enacted the act of 1902 (32 Stat. 193; 21 U. S. C. A., section 25) declaring that the police power of the states should extend to oleomargarine notwithstanding sales were made in original packages. We quote the act:

"'All articles known as oleomargarine, butterine, imitation, process, renovated, or adulterated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or Territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police powers to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.'"

Even in the absence of this statute the *Schollenberger* case would no longer be controlling for in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, the court definitely repudiated the original package doctrine as applied to commerce between states.

In *Hammond Packing Company v. Montana*, 233 U. S. 331, in sustaining a tax of 4c a pound upon sales of oleomargarine the court said; at page 333:

"* * * Apart from interference with commerce among the states, a State may restrict the manufacture of oleomargarine in a way in which it does not hamper that of butter. *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 246. It even may forbid the manufacture altogether. *Powell v. Pennsylvania*, 127 U. S. 678. It may express and carry out its policy as well in a revenue as in a police law. *Quong Wing v. Kirkendall*, 223 U. S. 59, 62. * * *."

Appellant argues that *Weaver v. Palmer Brothers Co.*, 270 U. S. 402, over-rules the *Powell* case but in that case the court very pointedly said (page 414): "The facts clearly distinguish this case from the *Powell* case."

Appellant makes quite an elaborate argument, however, on certain cases from state courts dealing with statutes prohibiting the sale of oleomargarine. We will later show that the decisions of our state courts are so divided as to be of no assistance. Nor do we need to look to these cases for assistance in view of the well considered cases in the Federal courts.

It is submitted that the case of *Powell v. Pennsylvania*, 127 U. S. 678, has not been over-ruled and

that on its authority the tax involved in this case would be sustained even if it amounted to a prohibition of intrastate sales of oleomargarine.

Fisher Flouring Mills v. Brown, 109 Wash. 692-697.

CHAPTER 23 OF WASHINGTON LAWS OF 1931 IS NOT CONFISCATORY AND DOES NOT DESTROY THE OLEOMARGARINE BUSINESS.

But if we assume for purposes of argument that the sale of oleomargarine cannot validly be prohibited there is nothing to show that the act is prohibitory in character unless it be that up to the date of the trial below no sales of oleomargarine had been made. This is not sufficient. The record shows that appellant had not tried to sell any oleomargarine in the state of Washington since the act was passed (R. 38). Is it reasonable to suppose that appellant would attempt any taxable sales pending the final outcome of this litigation when any such attempt would mean the undermining of its case?

In its second assignment of error appellant states "The sole purpose of the purported tax is to burden or prohibit the manufacture within, the importation into, and sale within the state of Washington of oleomargarine in aid of the dairy industry, a purely private business."

We have already shown and it must be conceded that this is a revenue act and that the courts will not look into the motives of the legislature in passing the law.

The act does not prohibit the manufacture of

oleomargarine. That must be admitted. The tax is placed on the "distributor" (section 2, R. 11), or as found by the court below on the "dealer" (R. 44).

Butter substitutes moving in interstate commerce are not taxable. The court below found that the tax was operative only when the interstate commerce relation to the oleomargarine was ended (R. 44).

Butter substitutes when sold within the state for exportation are not taxable (R. 13), and it is pointed out in the opinion of Judge Cushman (R. 54) that since the law taxed intrastate sales and left interstate sales untaxed, it benefited the importing part of appellant's business.

If appellant has refused to avail itself of its right to import butter substitutes in interstate commerce without payment of this tax, others engaged in the same business have not been so lax.

How can it be contended that the entire business is destroyed by an act which simply taxes intrastate sales; not for export; and if imported then only such intrastate sales as have lost their relation to interstate commerce?

Appellant rests its case upon the relative prices of oleomargarine and butter, without regard to the cost of production, and argues that with the prices of these two commodities the same as they were at the date of the trial below it was impossible for oleomargarine to compete with butter if the tax were paid.

Should the price of butter rise or the price of oleomargarine fall to a point where the tax on oleomargarine could be paid with profit, appellant would, if logical, concede the constitutionality of the tax.

The court will not rest the constitutionality of this act upon the upward or downward movement of the price of butter or butter substitutes.

APPELLANT'S REAL CLAIM IS THAT THE TAX DISCRIMINATES BETWEEN BUTTER AND OLEOMARGARINE.

It is apparent that in alleging the prohibitory character of the tax involved in this case, appellant is not relying on the claim of excessiveness so much as the fact that butter is not subject to a similar tax.

For if we were to assume that the legislature levied a tax of fifteen cents a pound on both butter and butter substitutes, there could be no claim of confiscation and this case would not be here. The case is premised on the fact that another product is not similarly taxed.

Yet counsel for appellant concede that there is a basis for classifying oleomargarine separately from butter (R. 40) and the courts have sustained such a classification.

Hammond Packing Co. v. Montana, 233 U. S. 331.

Appellant, however, attempts to treat the question of alleged excessiveness separate from the question of discrimination and argues that this tax is

fixed at such an unreasonable amount as by its very terms to indicate an intent on the part of the legislature to suppress the oleomargarine industry.

A TAXING ACT CANNOT BE CONSTRUED AS CONFISCATORY MERELY BECAUSE OF ITS AMOUNT.

Conceding for the purpose of argument, that a prohibitive tax might be invalidated by the courts, it does not follow that the act involved in this case falls in that category merely because the tax is fixed at 15c a pound.

In *Williams v. Fears*, 179 U. S. 270, the court sustained a tax of $500.00 a year upon emigrant agents. The court said in the course of its opinion (p. 275):

"The general legislative purpose is plain, and the intention to prohibit this particular business cannot properly be imputed from the amount of the tax payable by those embarked in it, even if we were at liberty on this record to go into that subject."

In the case of *Sperry & Hutchinson v. Blue*, 202 Fed. 82, the circuit court of appeals for the fourth circuit upheld a tax on all persons engaged in the trading stamp business of $500.00 for each county in which said business was carried on. It was contended in that case as it was here that this tax was prohibitive. During the course of the opinion it said (p. 88):

"But there is still another difficulty in the way of holding this tax invalid. Has this court, or any court, the right to say that a tax may not be levied because in the judgment of the court the amount is

so large that it could not reasonably have been intended to produce revenue? * * *."

In the Washington case of *Stull v. De Mattos*, 23 Wash., page 71, a tax of $25.00 a day imposed upon auctioneers was sustained. The court said at page 79:

"* * * All presumptions and intendments are in favor of the validity of the tax. * * * In other words, the mere amount of the tax does not prove its invalidity. To determine the amount of revenue required by the needs of the municipality, when not limited by constitutional barriers, is within the sole discretion of the legislative authorities, and the courts have no warrant to interfere with that discretion. * * *."

From the earliest times the United States supreme court has held that the judiciary is without power to invalidate a tax, which is otherwise without objections, because of its amount, even though it may possibly be so high as to be prohibitive:

McCulloch v. Maryland, 4 Wheat. 316;
Providence Bank v. Billings, 4 Peters 514;
Weston v. Charleston, 2 Peters 449;
Austin v. Boston, 7 Wall. 694;
Union Pacific v. Peniston, 18 Wall. 5;
Veazie Bank v. Fenno, 8 Wall. 533;
Kirkland v. Hotchkiss, 10 Otto 491.

In *Spencer v. Merchant*, 125 U. S. 345, the question involved was the claimed excessiveness of certain special assessments. During the course of the opinion the court said (p. 355):

"* * * The power to tax belongs exclusively to the legislative branch of the government. *United*

States v. New Orleans, 98 U. S. 381, 392; *Meriwether v. Garrett,* 102 U. S. 472. In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.' (Citing cases listed above) * * *."

The case of *McCray v. United States,* 195 U. S. 27, involved the constiutionality of the Federal tax of ten cents a pound upon colored oleomargarine. Regarding the claim that the tax was so large as to be prohibitory, Chief Justice White said (page 54):

"It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

Shortly thereafter in *Kehrer v. Stewart,* 197 U. S. 60, the court had before it an occupation tax

upon meat dealers and, as against the same contention, said (p. 70):

"What the necessity is for such tax, and upon what occupations it shall be imposed, as well as the amount of the imposition, are exclusively within the control of the state legislature. So long as there is no discrimination against citizens of other states, the amount and necessity of the tax are not open to criticism here."

In *Patton v. Brady,* 184 U. S. 608, involving a Federal tobacco tax, the court said (p. 623):

"It is not the province of the judiciary to inquire whether the exercise *is reasonable in amount,* or in respect to the property to which it is applied. *These are matters in respect to which the legislative determination is final.*" (Italics ours.)

Despite all the foregoing authority, which is all one way, a final attempt was made in the case of *Flint v. Stone Tracy Co.,* 220 U. S. 107, to have the court uphold the contention then made that because of the effect of the exercise of the power to tax, the power should be denied. Mr. Justice Day, speaking for the court (p. 168), said:

"It is urged that this power can be so exercised by Congress as to practically destroy the right of the states to create corporations, and for that reason it ought not to be sustained, and reference is made to the declaration of Chief Justice Marshall in *McCulloch v. Maryland,* that the power to tax involves the power to destroy. This argument has not been infrequently addressed to this court with respect to the exercise of the powers of Congress."

The court reviewed the authorities above mentioned, and then said:

"The argument at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the representatives, and not in the exertion of unwarranted powers by courts of justice."

Nor can the rule be said to have been modified in any of the late cases by the United States supreme court. Indeed, in one very late case the court seems to have gone to extreme lengths in sustaining a tax claimed to be confiscatory. We refer to *Alaska Fish Co. v. Smith*, 255 U. S. 44, wherein the court had under consideration an act of the Territory of Alaska levying an excise tax of $2 a barrel or ton upon persons manufacturing fish oil, fertilizer and fish meal from herring. Said the court:

"The complainant alleges that the tax will prohibit and confiscate the plaintiff's business * * *. Even if the tax should destroy a business, it would not be made invalid or require compensation on that ground alone. Those who enter upon a business take that risk." *McCray v. United States* (citing cases).

The *Child Labor Tax* case, 259 U. S. 20, is both interesting and enlightening. It will be recalled that the court in *Hammer v. Dagenhart*, 247 U. S. 251, had invalidated an act of Congress forbidding transportation in interstate commerce of articles manufactured by the employment of child labor. This, the court said, was an attempt by Congress through the medium of the commerce clause to invade the police

power of the states reserved to them by the tenth amendment. Thereafter Congress enacted a law purporting to tax manufacturers employing child labor 10 per cent of their entire annual net profits. It was attempted to be sustained on the strength of the rule laid down in the cases we have cited. The court, however, refused to consider the imposition a tax but held it to be a penalty and accordingly void on the same ground as the prior act involved in the *Dagenhart* case. It said (p. 36):

"We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. *If it were an excise on a commodity or other thing of value we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax.* (Italics ours.) But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. * * *"

Continuing, the court said (p. 38):

"* * * Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them *and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive.* But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere pen-

alty with the characteristics of regulation and punishment. Such is the case in the law before us."

At page 41, discussing and distinguishing *Veazie Bank v. Fenno,* 8 Wall. 533, the court said:

"It will be observed that the sole objection to the tax there *was its excessive character.* Nothing else appeared on the face of the act." (Italics ours.)

On the authority of this case, we submit that the language of chapter 23, given its ordinary meaning, shows that the legislature levied an excise tax pure and simple and that nothing sinister or ulterior can be deduced therefrom, but that even if the legislature had in mind the incidental motive of discouraging the use of butter substitutes and encouraging the use of butter that would not serve to change the imposition from a tax to something else.

CASES CITED BY APPELLANT FROM OTHER STATES ARE NOT HARMONIOUS AND DO NOT SUSTAIN APPELLANT'S CONTENTION.

Notwithstanding the uniform holding of the supreme court of the United States and the decision of the supreme court of Washington, appellant cites and relies on certain decisions of the courts of other states.

A few of these decisions which are repeated again and again in appellant's brief will be noticed.

Jelke v. Emery, 193 Wis. 311, 53 A. L. R. 463. This case involved an act which made it a crime to either manufacture, sell or solicit orders for oleomar-

garine and therefore differs entirely from the taxing act here under consideration.

As the court below pointed out, the act in the case at bar does not prohibit the business under penalty as *Adams v. Tanner*, 244 U. S. 590, and *Weaver v. Palmer Bros. Co.*, 270 U. S. 402 (R. 44).

The decisions of the state courts are in hopeless confusion as will be seen by reference to the note following *Jelke v. Emery* in 53 A. L. R. at page 474. We consider it unnecessary to cite the many cases referred to in that note which oppose the holding in the reported case and sustain the position of appellees in this case.

Neither are *People v. Arensberg*, 105 N. Y. 123, nor *People v. Marx*, 99 N. Y. 377, in point here. In the first case a criminal statute was held to be constitutional. In the second case the act making it a criminal offense to sell an article intended as a butter substitute was held unconstitutional. Although neither of these decisions are apposite they are repeatedly cited and referred to in appellant's brief.

Neither is *Ex Parte Bock*, 125 Cal. App. 375, cited by appellant in point. This was clearly pointed out in the decision below (R. 44). A municipal ordinance does not bear the same status as to judicial review as a state statute.

Roach v. Ephren, 90 So. 609;
State v. Wilson, 168 Pac. 679.

Notwithstanding, appellant quotes and relies upon Cooley, Taxation (2d ed.), page 599, referring

to municipal governments, and *In re Quong Woo,* 13 Fed. 229, in which an ordinance was involved.

It is submitted that the well considered decisions in the later cases from the Federal courts, ignored by appellant, are deserving of consideration.

In *Best Foods v. Welch*, 34 Fed. (2d) 682, the statutory three judge court considered a statute of the state of Idaho imposing an excise of $200.00 a year on wholesale dealers and $50.00 a year on retail dealers in oleomargarine. The same objections that are now urged in the case at bar were urged in that case. The same authorities relied upon by appellant in this case were cited, construed and distinguished by the court in a very able opinion in that case.

The court, in *Best Foods v. Welch*, 34 Fed. (2d), at page 686, said:

"The act in issue exacts a definite license fee. It is significant that this money is placed in the general fund of the state and appears in the relation of a taxation measure, and as such may be sustained, and if for revenue the court cannot consider the reasonableness of the amount. Cooley on Taxation, vol. 1, sec. 29. The exercise of acknowledged power to tax may not be scrutinized by the court. The responsibility rests upon the legislature, and if unreasonably exercised redress rests with the people. *Spencer v. Merchant*, 125 U. S. 355, 8 S. Ct. 921, 31 L. Ed. 763. * * *."

Continuing, the court pointed out the difference between cases cited by appellant where a regulatory tax is involved and the case at bar in the following words:

"The distinction between a regulatory tax and one solely for revenue is that the regulatory tax must bear reasonable relation to the cost of such regulation (citing cases). But if imposed under the general taxing power, the amount rests wholly within the discretionary power of the taxing authority. * * *"

After the decision in *Best Foods v. Welch* the case of *Kelly v. Allen* came before the statutory court, consisting of circuit judges, Wilbur and Sawtelle and District Judge Neterer. In this case the state's authority to tax was squarely presented (p. 877). The decision is reported in 49 Fed. (2d) at page 876. On page 877 the court used this language:

"The power of the state to tax is unlimited (*Austin v. Aldermen of Boston*, 7 Wall. [74 U. S.] 694, 19 L. Ed. 224); it is the essential of political existence, and the essence of the prosperity of the state (*Nicol v. Ames*, 173 U. S. 509, 515, 19 S. Ct. 522, 43 L. Ed. 786). * * *"

Appellant Attempts to Distinguish the Cases In Point.

Counsel for appellant ignore *Best Foods v. Welch*, 34 Fed. (2d) 682; a case in which all the questions here raised were disposed of, but make an attempt to distinguish certain other cases which it is realized must be given consideration.

First, they choose to refer to the reasoning of Mr. Justice Holmes in *Hammond Packing Co. v. Montana*, 233 U. S. 331, as *dictum*. But, Justice Holmes in writing this opinion based his holding on *Powell v. Pennsylvania*, 127 U. S. 678, in which case

the court did hold that a state could prohibit the manufacture of butter substitutes altogether.

How can counsel argue that *Powell v. Pennsylvania* is overruled?

Nor is the holding in *Powell v. Pennsylvania* out of harmony with such cases as *Adams v. Tanner*, 244 U. S. 590, and *Weaver v. Palmer Bros.*, 270 U. S. 402. Those cases are distinguished in the very opinions themselves. They involve regulatory measures.

In the *Weaver* case the act prohibited under penalty the use of shoddy in the manufacturing of mattresses. The court said (270 U. S. 415):

"The business here involved is legitimate and useful and, while it is subject to all reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment."

Moreover, the arbitrary nature of the act was affirmatively established by proof of matters not appearing on the face of the act.

In the case at bar the tax is imposed under the general taxing power of the state and the attack is based solely on the amount of the tax. That is a matter which rests wholly in the discretion of the legislature whereas a regulatory tax, such as involved in *Weaver v. Palmer Bros.* and other cases relied on by appellant, must bear a reasonable relation to the cost of such regulation.

Best Foods v. Welch, 34 Fed. (2d) 682.

Does appellant argue that this court will invade the province of the legislature and say when a tax is reasonable in amount simply because the court has the power and duty to determine the reasonableness of an act regulating the manner of conducting a business such as was involved in the *Adams* case (244 U. S. 590), or the *Weaver case* (270 U. S. 402)?

If so, the argument is answered in *McCray v. United States*, 195 U. S., at page 61, where the court after reviewing the authorities said:

"The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers."

Reference to the abstract of arguments in the *McCray* case, to be found in 195 U. S., at p. 32, will show that the same points were raised in that case against a tax of ten cents a pound on oleomargarine which are sought to be raised here.

It was there argued that "the tax is so large that it is evident that it was imposed, not as an excise for revenue, but as a prohibition."

This argument was repulsed, the court saying squarely that the question was settled by the authorities.

This case cannot be ignored or distinguished by counsel. It is not only sound on authority, but sound on principle and reason. How can a court say that a tax of ten cents a pound is constitutional but a tax of twenty is not?

Can the court say a tax of $2.00 a barrel on fish is constitutional (*Alaska Fish Co. v. Smith*, 255 U. S. 44) but a tax of $2.50 is unconstitutional?

Can the same court which refused to inquire into the motives of the legislature in passing a tax of twenty-five dollars a day on auctioneers (*Stull v. De Mattos*, 23 Wash. 71) be expected to inquire into those motives if the tax levied were thirty or forty dollars a day?

Consider the result if the claimed excessiveness of the tax could be proven, as was attempted in the case at bar by the comparative market prices of competing articles of merchandise.

The market price of butter might rise or the price of butter substitutes fall, so that one day a tax on butter substitutes would be constitutional and the next day unconstitutional.

In the nature of things the legislature will adjust the taxes. The courts cannot. It must be presumed that butter is properly taxed and will remain so.

The taxing power is a legislative power, and as was said in the *Minnesota Rate* cases, 230 U. S. 352, with relation to the rate-making power, the court will not substitute its judgment for that of the legislature as to matters within the province of the legislature.

Counsel can not avoid the effect of *Alaska Fish Co. v. Smith*, 255 U. S. 44, by quoting the following sentence at the bottom of page 48:

"We need not consider whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us."

For the court did have before it a case exactly like the one at bar. That is, the claimed excessiveness of the amount, *without proof that the legislature transcended or exceeded its acknowledged power to tax,* was relied upon.

When the constituted authority of the state undertakes to exert the taxing power, and the validity of its action is brought before the Federal supreme court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

Green v. Frazier, 253 U. S. 233.

The opinions in *Alaska Fish Co. v. Smith,* 255 U. S. 44, *McCray v. United States,* 195 U. S. 27, and *Best Foods v. Welch,* 34 Fed. (2d) 682, answer every contention made by appellant in this case.

We therefore submit that there is nothing in this case from which this court can judicially determine that the tax imposed by chapter 23 is so excessive in amount as to be prohibitive and that even if it could be so determined, the tax, under the controlling authorities, must be sustained.

II.

Chapter 23 Is Not a Tax for a Private Purpose.

In the case of *State ex rel. Reiter v. Hinkle,* 161 Wash. 652, the supreme court of the state of Washington decided that the tax involved in this case was necessary for the support of the state government and its existing public institutions. The question is no longer an open one. That the holding of the Washington supreme court was correct will be at once seen from an inspection of the act.

Section 5 of the act (R. 12) provides that the revenues from the tax shall be paid "into the general fund of the state of Washington." It is therefore for a *public purpose* and valid.

Appellant quotes but one case of a private tax, *Loan Assn. v. Topeka,* 20 Wall. 655. In that case a tax was imposed to pay bonds theretofore issued in aid of private manufacturing plants, which by that means had been induced to locate in the city.

The difference between the tax involved in that case and this public revenue measure is at once apparent. None of the revenue to be derived from this act is to be used for any other than a public purpose. Certainly the dairymen get no part of it.

But appellant attempts to argue that this is a private tax in aid of the dairy industry because it destroys the competing oleomargarine industry.

We have already shown that the oleomargarine

industry has not been destroyed and that the tax is not confiscatory.

Once again it must be pointed out that this is an assault on the motives of the legislature. The point attempted to be made is completely answered by the *cases already cited to the effect* that the court will indulge every presumption in favor of the integrity of the tax, rather than question the motives of the legislature.

The court finding this to be a revenue meaure cannot hold it unconstitutional simply because the tax is large.

Counsel realizing the truth of this and being unable to find any authority to the contrary (except cases involving regulatory measures) attempt to find something else, as they say, on the very face of chapter 23.

On page 45 of appellant's brief we find the following statement:

"The tax is applied when and only when oleomargarine is sold or used as a substitute for butter."

We do not think counsel mean to imply that oleomargarine is used for any purpose other than a butter substitute, for the statement is made in an attempt to argue that because the legislature classified butter substitutes separately from butter for purposes of taxation, they adopted that classification in aid of the butter industry.

Counsel can not seriously contend that the separate classification of butter and butter substitutes

is invalid. If this is a proper classification, how can it be said that by adopting it the legislature did anything wrong? How can it be said that the legislature intended either to suppress the oleomargarine business or to aid the butter industry?

That a classification of butter and oleomargarine for taxing purposes is valid cannot be doubted.

Hammond Packing Co. v. Montana, 233 U. S. 331;
Quong Wing v. Kirkendall, 223 U. S. 59;
Heisler v. Thomas Colliery Co., 260 U. S. 245;
McCray v. U. S., 195 U. S. 27;
Alaska Fish Co. v. Smith, 255 U. S. 44;
Best Foods v. Welch, 34 Fed. (2nd) 682.

The *Montana* case has already been adverted to. Said the court:

"The argument for the plaintiff in error is that, the tax being pronounced or assumed by the state courts to be a tax for revenue, it is unjustifiable to put oleomargarine in a class by itself and to discriminate, for instance, between it and butter. But we see no obstacle to doing so in the constitution of the United States. * * *."

In the *Kirkendall* case a tax was levied upon hand laundries and not upon steam laundries. Sustaining the tax, the court said:

"It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary. * * *. If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

The *Heisler* case involved a tax upon anthracite coal which was not imposed upon bituminous coal.

This was asserted to be a wholly arbitrary classification. Mr. Justice McKenna held that "any classification is permissible which has a reasonable relation to some permitted end of governmental action. It is enough if the classification is reasonably founded in the purposes and policy of taxation;" further that "the purpose of the legislation may not be the correction of some definite evil but may only be to remove *obstacles to a greater public welfare.*" It was argued, however, that bituminous and anthracite coal came into direct competition with each other. To this, Justice McKenna said:

"The fact of competition may be accepted. Both coals, being compositions of carbon, are, of course, capable of combustion, and may be used as fuels, but under different conditions and manifestations, and the difference determines a choice between them even as fuels. By disregarding that difference and the greater ones which exist, and by dwelling on competition alone, it is easy to erect an argument of strength against the taxation of one and not of the other. But this may not be done. The differences between them are a just basis for their different classification; and the differences are great and important. They differ even as fuels; they differ fundamentally in other particulars. Anthracite coal has no substantial use beyond a fuel; bituminous coal has other uses. Products of utility are obtained from it. The fact is not denied and the products are enumerated, and the extent of their use. *They are, therefore, incentives to industries that the state, in natural policy might well hesitate to obstruct or burden;* and to yield to the policy or consider it is well within the concession of the power of the state, expressed in the cases we have cited. The distinction in the treatment of the respective coals being within the power

conceded by the cases to the state, it has logical and legal justification, and is, necessarily, not unreasonable or arbitrary."

The application of this statement to the classification made in the case at bar is direct. Dairying is a primary industry of the state, contributing to the welfare and prosperity of thousands of its citizens. In the production of butter there are involved many valuable by-products which "are incentives to industries that the state in its natural policy might hesitate to obstruct."

As a matter of fact the reasons prompting the classification, if material, are not hard to understand. They are adverted to in the opinion below and facts justifying this classification cannot be distorted into an argument that the purpose of the legislature was to aid a private industry.

We quote from *Best Foods v. Welch*, 34 Fed. (2d), at page 686:

"This court has no interest in the policy of the state revenue laws, so long as equal protection is not denied, and is reasonable and not purely arbitrary. Nor is the Fourteenth Amendment concerned with state legislation where there is a real difference and it will not create an artificial equality. *Quong Wing v. Kirkendall*, 223 U. S. 59, 32 S. Ct. 192, 193, 56 L. Ed. 350. There is no equality between the cow on the farm and her natural product, 'butter,' and the manufacturing plant at San Francisco, Salt Lake, or elsewhere, and its artificial product, 'Oleomargarine.' Each product has food value, but composed of different elements, and the difference determines between them as food, and is a just basis for classification. * * *."

In *Alaska Fish Co. v. Smith*, 255 U. S. 44, the contention was urged that the tax on manufacturers of fish oil, fertilizer and fish meal out of herring unconstitutionally discriminated between manufacturers utilizing herring for those purposes and those utilizing other kinds of fish. Mr. Justice Holmes said:

"We are content, however, to assume for the purposes of decision that, not to speak of other licenses, the questioned acts do bear more heavily upon the use of herring for oil and fertilizer than they do upon the use of other fish. But there is nothing in the constitution to hinder that. If Alaska deems it for its welfare to discourage the destruction of herring for manure, and to preserve them for food for man or for salmon, and to that end imposes a greater tax upon that part of the plaintiff's industry than upon similar use of other fish or of the offal of salmon, it hardly can be said to be contravening a constitution that has known protective tariffs for a hundred years."

A General Revenue Measure Is Not a Tax for a Private Purpose Simply Because Based on a Proper Classification.

There can be no doubt that this is the rule even though the tax on one industry may appear to aid a competing industry.

Nicol v. Ames, 173 U. S. 515;
Ohio Oil Co. v. Conway, 281 U. S. 146;
Bell's Gap Ry. v. Pennsylvania, 134 U. S. 232.

In the case last cited, the court said (134 U. S., at page 237):

"* * * We think that we are safe in saying, that the Fourteenth Amendment was not intended to

compel the state to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; *which are necessary for the encouragement of needed and useful industries*, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt."

If the classification rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law. As an example of the extent to which the court has gone in sustaining tax classifications we point to the recent chain store tax case: *State Board v. Jackson*, 283 U. S. 527.

In that case on page 537 the court said (75 Law Ed. 1256):

"It is not the function of this court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the court make this abundantly clear."

Counsel in arguing this assignment of error again attack the motives of the legislature and argue that the tax is prohibitory, basing their assumption on the retail prices of butter substitutes at the time of the act.

The whole case for appellant is summed up in the paragraph which we quote from, page 46 of appellant's brief:

"Not only so, but it is apparent that the members of the legislature knew when they passed the act that the tax would be prohibitory. At that time the difference in the retail price of butter and oleomargarine was from 10c to 12c. Nevertheless, a tax of 15c a pound was imposed on the sale of oleomargarine. The members of the legislature, therefore, knew that at that time such a tax would not produce a dollar of revenue and would prohibit the sale of oleomargarine."

It is apparent from this quotation that the retail prices fluctuate. In the absence of proof to the contrary the court must presume that the legislature had determined that this tax would not necessarily raise the price of butter substitutes above that of butter and that butter itself had been or would be properly taxed.

If appellant's argument is sound, the dairy farmer could avail himself of it the next time he is taxed unless the distributor of oleomargarine is similarly taxed, and the undoubted power of the legislature to classify oleomargarine and butter separately for purposes of taxation would be denied.

III.

Chapter 23 Does Not Constitute an Unlawful Interference With the Federal Taxing Power.

In arguing assignment of error No. 4, appellant assumes that the oleomargarine industry is destroyed by the tax. Of course, the manufacture of oleomargarine is not taxed by this act so that the Federal government receives the tax levied upon manufacturers.

Sales for export to other states are expressly not taxed and therefore the Federal government receives its tax from such sales.

The Federal government received its tax from oleomargarine shipped into the state either through agents or by order and it cannot be denied that many thousands of pounds of oleomargarine are being consumed in the state, notwithstanding the fact that no taxable sales were made prior to the trial of this case under chapter 23.

The Federal government receives its tax on all of this bufter substitute so used in the state and so shipped out of the state.

The Federal taxing power is therefore not interfered with. But we do not admit that the tax on sales for local consumption is prohibitive. That cannot be determined from the market price alone. Appellant's whole case is based on the market price at a certain time.

That being the only evidence to support the claim of confiscation, the court must sustain the act as a valid exercise of the state's taxing power.

In the exercise of its police power the state of Washington could have excluded or taxed oleomargarine even in the original package. This power was granted it by congress by the act of 1902 (Title 21 U. S. C. A. Sec. 25), and it has been held that a state may combine a tax and a police measure in one act without violating any constitutional rights.

Gundling v. Chicago, 177 U. S. 183.

But, the question has been definitely set at rest by the decision in *Plumley v. Massachusetts*, 155 U. S. 461; in which the court held that the Federal oleomargarine tax act did not in any way restrict the power of the states.

The Massachusetts' act involved in that case, forbade the manufacture and sale of oleomargarine in imitation of butter. The court said (pp. 465 and 466):

"The learned counsel for the appellant states that Congress in the act of August 2, 1886, has legislated fully on the subject of oleomargarine. This may be true so far as the purposes of that act are concerned. But there is no ground to suppose that Congress intended in that enactment to interfere with the exercise by the States of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine. The statute imposed certain special taxes upon manufactures of oleomargarine, as well as upon wholesale and retail dealers in that compound. And it is expressly declared (Sec. 3) that sections 3232 to 3241 inclusive and section 3243 of the Revised Statutes, Title Internal Revenue, 'are, so far as applicable, made to extend to and include and apply to the special taxes' so imposed, 'and to the persons upon whom they are imposed.' Section 3243 of the Revised Statutes is in these words: 'The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be

held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.' It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article. *License Tax Cases,* 5 Wall. 462, 474; *Pervear v. Commonwealth,* 5 Wall. 475; *United States v. Dewitt,* 9 Wall. 41."

Counsel for appellant attempt to argue that Congress intended only to allow a *reasonable tax* by the states. But it is submitted that Congress simply wished to make sure that the sovereign state's right to tax, so necessary for its existence, should not be abridged in any way. Section 3243 of the Revised Statutes, therefore provided, among other things, that the payment of the Federal tax on oleomargarine should not prohibit any state from placing "a duty or tax on the same trade or business for trade or other purposes."

Counsel can not read into this act or any other act a limitation on the taxing power that a tax must be reasonable in amount. Who is to be the judge of the reason-

ableness of the amount? Certainly not the tax payer. The legislature and the legislature alone has the power to levy, revise or forgive taxes.

In *Knowlton v. Moore*, 178 U. S. 41, at p. 60 the court said:

"* * * Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. * * *"

Both the national and state jurisdictions may act in their respective spheres, each unlimited by the other.

License Tax cases, 5 Wall. 462;
Snyder v. Bettman, 190 U. S. 249.

This is not a question of when either jurisdiction may tax property of the other such as was involved in *South Carolina v. U. S.*, 199 U. S. 437, or *Van Brocklin v. Tennessee*, 117 U. S. 151, cited by appellant.

Nor can appellant derive any comfort from the reasoning in *Minnesota v. Barber*, 136 U. S. 313, in which case the act involved directly excluded all beef, etc., taken from animals slaughtered in other states, a discrimination in favor of *like products and business of Minnesota.*

IV.

Chapter 23 Does Not Violate the Commerce Clause of the Federal Constitution.

The tax in this case by its very terms does not attach until interstate transportation is ended. Even if the tax attached to sales in original packages, it would not violate the Federal commerce clause (Title 21 U. S. C. A., Sec. 25).

Sonneborn Bros. v. Cureton, 262 U. S. 506.

In the last named case the court had before it an occupation tax levied upon persons engaged in the importing of and sale in original packages of oil in the state of Texas. We quote from the decision, pages 508 and 509:

"* * * Is this a regulation of, or a burden upon, interstate commerce? We think it is neither. The oil had come to a state of rest in the warehouse of the appellants and had become a part of their stock with which they proposed to do business as wholesale dealers in the State. The interstate transportation was at an end, and whether in the original packages or not, a state tax upon the oil as property or upon its sale in the State, if the state law levied the same tax on all oil or all sales of it, without regard to origin, would be neither a regulation nor a burden of the interstate commerce of which this oil had been the subject."

There can be no question but that this is the rule, and appellant is forced to rely on cases such as *Gramb-ling v. Maxwell*, 52 Fed. (2d) 256, in an attempt to argue that the Washington tax violates the commerce clause.

In that case a North Carolina statute by its very terms applied to peddlers of fruit who did not maintain

a permanent place of business in the state. It exempted from the tax peddlers of fruit who did maintain a permanent place of business in the state.

It can not be denied, of course, that such a tax would be unconstitutional, but the court recognized that a tax such as that involved in the case at bar wherein there is no discrimination would be constitutional.

We quote from page 258 the language immediately preceding the quotation set forth on page 67 of appellant's brief:

"On the first question, the constitutionality of the tax, it is of course well settled that a state may impose a tax on those carrying on the business of peddlers, even though the goods sold may have been brought into the state in interstate commerce, so long as there is no discrimination in the tax against the goods of other states." (Citing cases.)

Another case relied upon by appellant in arguing that the Washington tax offends against the commerce clause is *Minnesota v. Barber*, 136 U. S. 313. That case involved a statute of the state of Minnesota which by its necessary operation practically excluded all meat taken from animals slaughtered in other states. It was directly designed to prevent the introduction into the state of meats from animals slaughtered elsewhere.

Whereas, in the case at bar the act applies the tax indiscriminately to all butter substitutes sold in the state, regardless of the place of manufacture. It does not discriminate against oleomargarine manufactured in other states so as to erect a tariff barrier.

Even if there were no butter substitutes manufac-

tured in the state of Washington, the objection urged by appellant would not be well founded.

Wagner v. City of Covington, 251 U. S. 95;
Askren v. Continental Oil Co.; 252 U. S. 444.

In arguing this assignment of error, counsel again refers to *Schollenberger v. Pennsylvania*, 171 U. S. 1, and *Collins v. New Hampshire*, 171 U. S. 30. These cases have been heretofore distinguished and were distinguished by the court below.

Again in arguing this assignment of error, counsel for appellant concede that the tax involved in this case would be valid if reasonable. We have already cited cases to the effect that the legislature is the sole judge of the reasonableness of this tax.

Appellant's whole argument, therefore, is based upon the assumption that this tax is so great as to be prohibitory. While appellant makes four assignments of error and counsel divide their argument into four parts, each part is based upon this assumption: That the tax is prohibitory.

But, chapter 23 on its face and by its necessary application shows that it is not a burden on interstate commerce. Section 10 thereof provides that the tax shall not be imposed on butter substitutes when sold for exportation from the state of Washington to any other state, territory or nation (R. 13).

Section 13 of the act (R. 14) expressly provides that no tax shall be collected on sales which are protected by the constitution and laws of the United States. Indeed,

the act does not go as far as it might for it does not tax sales in the original package.

How then can an argument be made that the effect of this act is to destroy or even constitute a real hindrance to interstate commerce? It is submitted that this act instead of being a hindrance to interstate commerce would be a benefit. This was the opinion of Judge Cushman in his separate concurring opinion (R. 55).

That the court was right is shown by the fact which can not be disputed that thousands of pounds of butter substitute are being consumed in the state of Washington, although the sales may not be taxable under chapter 23. These butter substitutes moved in interstate commerce. The Federal tax was paid on each and every pound. Contrary to the inference contained in appellant's brief these interstate sales are not confined to individual shipments by mail order.

The act does not, in fact, either infringe upon the Federal taxing power or contravene the commerce clause.

SUMMARY

All of the points raised by counsel in this case are based upon the market prices of butter and butter substitutes at the time of the act. The case, therefore, differs from *Field Packing Co. v. Glenn*, 5 Fed. Sup. No. 1, page 4, in which evidence was adduced to show the comparative cost of production of oleomargarine and butter; the differential in prices over a period of years (from 1914 to 1931); and in which it was proved that a bona fide attempt was made to sell oleomargarine. All of these facts are wanting in the case at bar. Moreover, as this court pointed out in *Glenn v. Field Packing Co.*, 54 Sup. Ct. Rep., page 138, the supreme court of the state of Kentucky had not passed upon the act.

The supreme court of the state of Washington has passed on the Washington act. Immediately after the passage of chapter 23, certain proper parties sought to file with the secretary of state a referendum petition whereby that chapter would be submitted to the voters of the state.

Inasmuch as chapter 23 contained an emergency clause, the filing of the application was refused and counsel for appellant in this case filed an action in the supreme court of the state of Washington in the nature of mandamus to compel the filing of this petition for referendum. (*State ex rel. Reiter v. Hinkle*, 161 Wash. 652.) The petition was denied, the court holding that the measure was necessary for the support of the state govern-

ment and, therefore, under the emergency clause the petition could not properly be filed.

Under our procedure mandamus is simply an ordinary civil action. The constitutionality of the entire act was properly raised, and the Washington supreme court has held that this act is valid and emergent.

State v. Roberge, 144 Wash. 74;
State v. Vincent, 144 Wash. 246, pp. 250 and 251.

The same argument was presented in the Washington case as is presented in this case.

In conclusion, it is submitted that chapter 23, Laws of Washington for 1931, is constitutional and that the decision of the court below should be sustained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 589.—October Term, 1933.

A. Magnano Company, Appellant,
vs.
G. W. Hamilton, as Attorney General of the State of Washington, et al., etc.

Appeal from the District Court of the United States for the Western District of Washington.

[April 2, 1934.]

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant assails as invalid a statute of the State of Washington which levies an excise tax of fifteen cents per pound on all butter substitutes sold within the state. Every distributor of such butter substitutes is required to file a duly acknowledged certificate with the Director of Agriculture, containing the name under which the distributor is transacting business within the state and other specified information. Sale of any butter substitute is forbidden until such certificate is furnished. The distributor must render to the Director of Agriculture, on the fifteenth day of each month, a sworn statement of the number of pounds of butter substitutes sold during the preceding calendar month. Section 10 of the act provides that the tax shall not be imposed on butter substitutes when sold for exportation to any other state, territory, or nation; and any payment or the doing of any act which would constitute an unlawful burden upon the sale or distribution of butter substitutes in violation of the Constitution or laws of the United States is by § 13 excluded from the operation of the act. Violation of any provision of the act is denounced as a gross misdemeanor.

Appellant is a Washington corporation, and has for many years been engaged in importing and selling "Nucoa," a form of oleomargarine. Prior to the passage of the act, it had derived a large annual net profit from sales made within the state. Since then, claiming the tax to be prohibitive, it has made no intrastate sales and no effort to do so. "Nucoa" is a nutritious and pure article of food, with a well established place in the dietary.

Suit was brought to enjoin the enforcement of the act, on the ground that it violates the federal Constitution in the following particulars: (1) that the imposition of the tax has the effect of depriving complainant of its property without due process of law and of denying to it the equal protection of the laws, in violation of the Fourteenth Amendment; (2) that the tax is not levied for a public purpose, but for the sole purpose of burdening or prohibiting the manufacture, importation and sale of oleomargarine, in aid of the dairy industry; (3) that the act imposes an unjust and discriminatory burden upon interstate commerce; and (4) that it interferes with the power of Congress to levy and collect taxes, imposts and excises, in violation of Art. I, § 8.

The case came before a statutory court of three judges, under § 266 of the Judicial Code, as amended, 28 U. S. C., § 380, first upon an application for an interlocutory injunction, which was denied, 2 F. Supp. 414, and subsequently for final hearing, at the conclusion of which that court made written findings of fact and conclusions of law, as required by Equity Rule 70½, and entered a final decree dismissing the bill. 2 F. Supp. 417.

First. We put aside at once all of the foregoing contentions, except the one relating to due process of law, as being plainly without merit. 1. In respect of the equal protection clause it is obvious that the differences between butter and oleomargarine are sufficient to justify their separate classification for purposes of taxation. 2. That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the tax, and not to any ulterior motive or purpose which may have influenced the legislature in passing the act. And a tax designed to be expended for a public purpose does not cease to be one levied for that purpose because it has the effect of imposing a burden upon one class of business enterprises in such a way as to benefit another class. 3. The act, considered as a whole, clearly negatives the idea that a burden is imposed upon interstate commerce, as the court below held. The tax is confined to sales within the state, and (§§ 10 and 13, *supra*) has no application to sales of oleomargarine to be either imported or exported in interstate commerce. 4. The contention that the act interferes with the taxing power of the United States seems to be based upon the supposition that the state tax is so great that it

will put an end to the sale of oleomargarine within the State of Washington, and thereby destroy a potential subject of federal taxation. Assuming such a consequence and putting other questions aside, the effect of it upon appellant would be so remote, speculative and indirect as to afford appellant no basis for invoking the powers of a court of equity. Compare *Massachusetts* v. *Mellon*, 262 U. S. 447, 487; *Florida* v. *Mellon*, 273 U. S. 12, 17-18.

Second. Except in rare and special instances,* the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24. And no reason exists for applying a different rule against a state in the case of the Fourteenth Amendment. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 329; *Heiner* v. *Donnan*, 285 U. S. 312, 326. That clause is applicable to a taxing statute such as the one here assailed only if the act be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property. Compare *M'Culloch* v. *Maryland*, 4 Wheat. 316, 423; *Child Labor Tax Case*, 259 U. S. 20, 37 *et seq.*; *McCray* v. *United States*, 195 U. S. 27, 60; *Brushaber* v. *Union Pac. R. R.*, *supra*, 24-25; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614-615; *Nichols* v. *Coolidge*, 274 U. S. 531, 542. Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry. *McCray* v. *United States*, *supra*, 56-59. Nor may a tax within the lawful power of a state be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses (*Loan Association* v. *Topeka*, 20 Wall. 655, 663-664; *McCray* v. *United States*, *supra*, 56-58, and authorities cited; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49; *Child Labor Tax Case*, *supra*, 38, 40-43), unless, indeed, as already indicated, its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was

*See Brushaber *v.* Union Pacific R. R., 240 U. S. 1, 24-25; Nichols *v.* Coolidge, 274 U. S. 531, 542-543; Heiner *v.* Donnan, 285 U. S. 312, 325-328. Compare Schlesinger *v.* Wisconsin, 270 U. S. 230, 239-240.

exercised, in reality, another and different power denied by the federal Constitution to the state. The present case does not furnish such a demonstration.

The point may be conceded that the tax is so excessive that it may or will result in destroying the intrastate business of appellant; but that is precisely the point which was made in the attack upon the validity of the ten per cent. tax imposed upon the notes of state banks involved in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548. This court there disposed of it by saying that the courts are without authority to prescribe limitations upon the exercise of the acknowledged powers of the legislative departments. "The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected." Again, in the *McCray* case, *supra*, answering a like contention, this court said (p. 59) that the argument rested upon the proposition "that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority." And it was held that if a tax be within the lawful power of the legislature, the exertion of the power may not be restrained because of the results to arise from its exercise.

In *Alaska Fish Co.* v. *Smith*, *supra*, 48-49, a statute of Alaska levying a heavy license tax upon persons manufacturing fish oil, etc., was upheld as constitutional against the contention that it would prohibit and confiscate plaintiff's business. "Even if the tax," the court said, "should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. . . . The acts must be judged by their contents not by the allegations as to their purpose in the complaint. We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation."

In the *Child Labor Tax Case*, *supra*, this court, in holding unconstitutional the provisions of the Revenue Act of February 24, 1919, imposing a tax upon the employment of child labor, fully

recognized the foregoing limitations upon the judicial authority; but declared that the act constituted an attempt to regulate a matter exclusively within the control of the state, and that although the exaction was called a tax it was, in fact, not a tax but a penalty exacted for the violation of the regulation. "Taxes are occasionally imposed," it was said (p. 38), "in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment. Such is the case in the law before us."

The statute here under review is in form plainly a taxing act, with nothing in its terms to suggest that it was intended to be anything else. It must be construed, and the intent and meaning of the legislature ascertained, from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used. *Child Labor Tax Case*, *supra*, 36. If the tax imposed had been five cents instead of fifteen cents per pound, no one, probably, would have thought of challenging its constitutionality or of suggesting that under the guise of imposing a tax another and different power had in fact been exercised. If a contrary conclusion were reached in the present case, it could rest upon nothing more than the single premise that the amount of the tax is so excessive that it will bring about the destruction of appellant's business, a premise which, standing alone, this court heretofore has uniformly rejected as furnishing no juridical ground for striking down a taxing act. As we have already seen, it was definitely rejected in the *Veazie Bank* case, where it was urged that the tax was "so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank"; in the *McCray* case, where it was said that the discretion of Congress could not be controlled or limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive; in the *Alaska Fish* case, from which we have just quoted; and in the *Child Labor Tax Case*, where it was held that the intent of Congress must be derived from the language of

the act, and that a prohibition instead of a tax was intended might not be inferred solely from its heavy burden.

From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the law makers to realize by legislation directly addressed to their accomplishment. Those decisions, as the foregoing discussion discloses, rule the present case.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.